TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 170.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 8, 1904.

(19,192.)

(19,192.)

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 11, 1904.

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a UNITED STATES OF AMERICA, *District of Kentucky, Sixth Judicial Circuit,* } ss:

To the Barber Asphalt Paving Company and the City of Louisvi
Greeting:

You are hereby cited and admonished to be and appear a
session of the Supreme Court of the United States to be holden
the city of Washington, in District of Columbia, on the* 14th d
of January next, pursuant to a writ of error filed in the clerk's offi
of the court of appeals of Kentucky, wherein The Louisville a
Nashville Railroad Company is plaintiff in error, and you are
fendants in error, to show cause, if any there be, why the judgme
rendered against the said plaintiff in error, as in the said writ of er
mentioned, should not be corrected, and why speedy justice shou
not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of t
United States, this 17th day of December, in the year of our Lo
one thousand nine hundred and three, and of the Independence
the United States of America the one hundred and twenty-eighth.

A. R. BURNAM,
Chief Justice, Court of Appeals, Ky.

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* Not exceeding 30 days from the day of signing.

b [Endorsed:] Citation 1903 Dec'r 19 Filed

Service of citation accepted.
Dec. 18, '03.

BENJAMIN F. WASHER,
Att'y for Barber Asphalt Paving Company.
HENRY L. STONE,
City Attorney for City of Louisville.

c *Pleas.*

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, Kentucky, November 19th, A. D. 1903.

Present: Chief Justice Burnam, and Associate Judges Hobson, Paynter and Barker.

Caption.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
THE BARBER ASPHALT PAVING COMPANY and CITY OF LOUISVILLE, Appellees.

Be it remembered that heretofore, to-wit: on the 24th day of August, A. D. 1903, the appellant, by its counsel, Helm, Bruce & Helm, filed in the office of the clerk of the court of appeals of Kentucky a transcript of record, in words and figures following, to-wit:

1 # 29790.

STATE OF KENTUCKY,
County of Jefferson.

Pleas before the Honorable Shackelford Miller, judge of the Jefferson circuit court, chancery branch, first division, at the court house, in the city of Louisville, county and State aforesaid, and on the dates hereinafter named.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.
} Transcript of Record.

Be it remembered, that heretofore, to-wit: on the 21st day of August, 1901, came plaintiff, by counsel, and filed its petition and one exhibit herein.

Said petition is in words and figures as follows, to-wit:

Jefferson Circuit Court.

THE BARBER ASPHALT PAVING CO., Plaintiffs,
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CITY OF Louisville, Defendants.

The plaintiff states that prior to the 5th day of May, 1899, t board of public works of the city of Louisville submitted to t general council of the city of Louisville a grade map
2 Frankfort Ave. from Cavewood Ave., to Raymond Av which map was examined by said general council and it w thereupon resolved by the general council of the city of Louisvil that the grade of said Frankfort Ave. should be and remain as i dicated on said map, and which resolution was approved by t mayor of the city of Louisville on the 5th day of May, 1899.

Afterwards the board of public works recommended to the ge eral council of the city of Louisville for passage an ordinance e titled "An ordinance for improving a part of Frankfort Ave. fro the center line of Cavewood avenue to the center line of Raymo avenue extended." Said ordinance provided that the carriage w of Frankfort Ave. aforesaid should be forty (40) feet in width a should be improved by grading, curbing and paving with the a phalt pavement, and that said work should be done at the cost the owners of the ground on the northerly side of Frankfort Av from the center line of Clifton Ave. extended to the center line Ewing Ave. and Ewing Ave. extended and extending back to a dep of 195 feet and on the southerly side of Frankfort Ave. from t center line of Cavewood Ave. and Cavewood avenue extended to t center line of Raymond Ave. and Raymond Ave. extended and e tending back to a depth of 195 feet. The cost to be apportion among the owners of the lots of land within the limit above set o according to the number of square feet of ground owned by t parties respectively.

The plaintiff states that Frankfort avenue from Cavewood Ave. Raymond Ave. is now and was at all times herein mentioned a pri cipal public way of and in the city of Louisville, Ky., and that t territory contiguous to Frankfort Ave. between Cavewood and Ra mond Ave. is not now nor was it at any of the times herein me tioned defined into squares by principal public streets.
3 Said ordinance was duly passed by the general council the city of Louisville, and was approved on the 6th day June, 1900, by the mayor of the city of Louisville, and was pu lished on the 11th day of June, 1900, in and by the Louisville Di patch and the Louisville Anzeiger.

Plaintiff states that on the 8th day of May, 1900, the Louisvil Dispatch was a newspaper printed and published daily in the cit

of Louisville, Kentucky, in the English language, and having on said date the largest permanent *bona fide* circulation of any newspaper printed or published in said city at said time and in said language.

Plaintiff states that on the 8th day of May, 1900, the Louisville Anzeiger was a newspaper printed and published daily in the city of Louisville, Ky., in the German language, and having on the said date the largest permanent *bona fide* circulation of any newspaper printed or published at said time in said language.

That on the 8th day of May, 1900, the general council of the city of Louisville, in joint session, on a *viva voce* vote, elected and selected the said Louisville Dispatch and said Louisville Anzeiger as the official public newspapers and printers of the city of Louisville, in which to publish all ordinances, notices and advertisements of said city for and during the year next thereafter ensuing.

Afterwards the board of public works of the city of Louisville advertised in said Louisville Dispatch and Louisville Anzeiger, on the 19th day of June, 1900, and the 26th day of June, 1900, that they would on the 2nd day of July, 1900, receive bids, offers and proposals for the improvement of said Frankfort avenue, according to the provisions of said ordinance, and that the plans and specifications were on file in the office of said board, and that bond
4 with approved security would be required for the faithful performance of said contract, and the plaintiff says that on the 2nd day of July, 1900, in answer to said advertisement, the plaintiff bid, offered and proposed to the said board of public works that it would do said work at the following named rates and prices, and afterwards furnished the labor and material therefor, as follows, viz.:

6932.2 yds.	excavation at 26c	$1802.47
66.9 "	embankment at 10c	6.69
3474.7 "	curbing at 47c	1633.11
11–24 in.	corner stones at $3.50	38.50
170.3 yds.	binds at 45c	76.63
8206.3	asphalt paving at $2.00	16412.60
	Making a total of	$19970.00

and which was the lowest and best bid made to or received by the said board of public works, and as such was accepted.

Thereupon a contract was entered into by and between the said plaintiff and the City of Louisville, wherein and whereby the plaintiff agreed and bound itself to improve the carriage way of said Frankfort Ave. by grading, curbing and paving with the asphalt pavement at the rates and prices therein named being the same as the rates and prices set forth in its said bid and wherein and whereby the City of Louisville bound and obligated itself that it should be paid therefor at the rates and prices therein named.

Said contract was approved by the general council of the city of Louisville, and by the mayor of said city. The plaintiff states that it did furnish all the necessary labor and material therefor, and did grade, curb and pave the carriageway of Frankfort Ave. from Cavewood Ave. to Raymond Ave. as provided in its said contract,
5 and thereby became entitled to receive the amounts named in said contract.

Afterwards on the 20th day of December, 1900, the said board of public works advertised in the Louisville Dispatch and the Louisville Anzeiger that it would on the 22nd day of Dec., 1900, appear on the premises and inspect and try whether the said plaintiff had completed said improvement according to its said contract, and the plaintiff says that on the 22nd day of December, 1900, the said board of public works, by its deputy, did appear on the premises and inspect and try and did decide that the said plaintiff had completed its said contract, and did then and there for and on behalf and in the name of the City of Louisville receive and accept the same, and plaintiff thereby became entitled to receive said sum of $19970.00. The plaintiff says that on the 10th day of Dec., 1900, the Louisville Dispatch was a newspaper in general circulation, printed and published daily in the city of Louisville, Kentucky, in the English language, and on said 20th day of Dec., 1900, the Louisville Anzeiger was a newspaper in general circulation, printed and published in said city in the German language.

Thereupon the said board of public works made an apportionment of the cost of said improvement among the owners of the lots of land in the limits contiguous to said improvement, according to the number of square feet of ground owned by each of the parties respectively, as provided in said ordinance, and afterwards made out, issued and delivered to the said plaintiff apportionment warrants against the parties and for the amounts named in said apportionment, and among others an apportionment warrant against the defendant Louisville and Nashville Railroad Co., who was then and is now the owner and in possession of the lot of land hereinafter described for the sum of $3472.94, which apportionment warrant is dated 21st day of February, 1901, and bears interest from
6 date until paid at the rate of 6 per cent. per annum, and is secured by a superior lien on the following described lot or parcel of land in the city of Louisville, Kentucky, which lot cannot be divided without materially impairing its value, and beginning at the center line of Clifton Ave. with the north line of the right of way of the Louisville and Nashville Railroad Co. running thence eastwardly, along the north line of said right of way 407 feet, thence northwardly 10 feet, and thence again eastwardly and along the right of way of said L. & N. R. R. Co. 366 feet, thence southwardly 10 feet, and thence eastwardly and along said right of way to the center line of Ewing Ave. and thence southwardly with the center line of Ewing Ave. and Ewing avenue extended 60 feet to the south side of the right of way of the L. & N. R. R. Co. and

thence westwardly along the south side of said right of way to the center line of Clifton Ave. and Clifton Ave. extended, and thence northwardly with the center line of Clifton avenue and Clifton Ave. extended to the beginning.

The plaintiff states that it is a corporation organized under the laws of the State of West Virginia, with power to contract and be contracted with, and sue and be sued. That the defendant Louisville & Nashville Railroad Company is a corporation organized under the laws of the State of Kentucky with power to contract and be contracted with and sue and be sued. Said warrant is now long past due, and payment has been demanded, but no part thereof has been paid. Plaintiff will, if required, file herewith as part hereof copies of said ordinance, contract and apportionment attested by the comptroller of the city of Louisville, and also file herewith as part hereof said apportionment warrant.

The plaintiff states that until improved as set out in this petition, the carriageway of said Frankfort avenue had not, nor had any part thereof, been improved, and the improvement of said
7 carriageway herein set out by the plaintiff was the original improvement and construction of said street.

Wherefore the plaintiff prays that it be adjudged a superior lien on the lot of land hereinabove described for said sum, with interest thereon at the rate of 6 per cent. per annum from the date of said warrant until paid and its costs herein expended, and that said lien be enforced and said property sold, and if for any reason said property should be held not liable for said apportionment warrant or any part thereof, then and in that event that the plaintiff have judgment against the City of Louisville therefor, and for all other general, special and equitable relief to which it may be entitled.

WILLIAM FURLONG,
Attorney for Plaintiff.

Exhibit filed with foregoing petition is as follows:

At a meeting of the board of public works of the city of Louisville held at their office in said city on the 21st day of February, 1901, it was by said board ordered that L. & N. R. R. pay to the Barber Asphalt Paving Co. thirty-four hundred and seventy-two and 94/100 dollars, $3472.94, being its proportion of the cost for improving Frankfort avenue from Cavewood Ave. to Raymond chargeable to 107507 square feet of ground in Ny. side liable to assessment for said cost as per apportionment of said cost and approved by the said board of public works on the above date.

BOARD OF PUBLIC WORKS,
By ROGER G. McGRATH,
Apportionment Clerk B. of P. W.

See that this lien is released.

8 And thereupon the clerk issued summons and two copies which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county Greeting:

We command you to summon Louisville & Nashville Railroad Company, City of Louisville to answer a petition filed against them in our Jefferson circuit court, by the Barber Asphalt Paving Company, and warn them that upon failure to so answer within twenty days after service hereof, if in Jefferson county, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled or proof taken at petitioner's option, and make due return of this summons within sixty days from date hereof.

Witness, John H. Page, clerk of said court, this 21st day of August, 1901.

JOHN H. PAGE, *Clerk.*
H. A. LINDSAY, *D. C.*

Sheriff's return on foregoing summons is as follows:

Came to hand Aug. 31st, 1901, at 1 p. m.

Executed Sept. 9, 1901, on City of Louisville by delivering a *copy* of the within summons to C. P. Weaver, mayor thereof.

H. A. BELL, *S. J. C.*,
By H. WOODS, *D. S.*

Executed September 16th, 1901, on Louisville & Nashville Railroad Company by delivering a copy of the within summons to M. H. Smith, president of said company, he being chief officer found in this county at this time.

H. A. BELL, *S. J. C.*,
By H. WOODS, *D. S.*

9 At a court held on the 5th day of October, 1901:

This action was set at rules by the plaintiff on September 30th.

Came the defendant, City of Louisville, by counsel, and filed a demurrer to the petition, and ordered that said demurrer be and is submitted.

Said demurrer filed on the 5th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
L. & N. R. R. Co. and CITY OF LOUISVILLE, Defendants.
} General Demurrer.

The defendant, City of Louisville, demurs to the petition of plaintiff because the same does not state facts sufficient to constitute or support a cause of action against it.

H. L. STONE,
City Attorney.

At a court held on the 12th day of October, 1901:

This action was set at rules by the plaintiff on October 7th.

Came the plaintiff by counsel and filed an amended petition and three exhibits herein.

Came the defendant Louisville and Nashville Railroad Company and filed its answer herein.

On motion of plaintiff ordered that this action be and is remanded to the rules.

10 Said amended petition filed on the 12th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., &C., Defendants.
} Amended Petition.

The plaintiff amends its petition herein and files herewith as parts hereof copies of the ordinance, contract and apportionment mentioned and referred to in its original petition herein.

Wherefore the plaintiff prays as in its original petition herein and for all proper relief.

WILLIAM FURLONG,
Attorney for Plaintiff.

Said exhibits filed with the foregoing amended petition are as follows:

11 No. 75, series 1900.

An ordinance for improving a part of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended.

Be it ordained by the general council of the city of Louisville:

That the carriage-way of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended shall be forty (40) feet in width, and shall be improved by grading, curbing and paving with the asphalt pavement. Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works, and at the cost of owners of ground on the northerly side of Frankfort avenue from the center line of Clifton avenue and Clifton avenue extended, to the center line of Ewing avenue and Ewing avenue extended and extending back to a depth of 195 feet; and on the southerly side of Frankfort avenue from the center line of Cavewood avenue and Cavewood avenue extended to the center line of Raymond avenue and Raymond avenue extended and extending back to a depth of 195 feet.

The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be and are hereby repealed.

S. F. HARLAN, *C. B. C.*
ALF W. DAVIS, *C. B. A.*
THEO. STERN, *P. B. C.*
P. B. REED, *P. B. A., Pd.*

Approved June 6, 1900.

CHAS. P. WEAVER, *Mayor.*

A copy.

Attest: ALF. W. DAVIS.

This is a true and correct copy of the original on file in my office.

JOHN H. HANCOCK,
City Comptroller.

On the back of said ordinance are the following indorsements:

Board of alderman, Nov. 2, 1899. Chas. C. Martin, C. B. A.

Board of councilmen Dec'r 13 1899, Sts. E. D. S. F. Harlan, C. B. C.

Board of councilmen May 22, 1900. Read and passed. S. F. Harlan C. B. C.

Board of alderman June 5, 1900. Engineer's committee, Alf. W. Davis, C. B. A.

Published June 11, 1900. Book 12 page 12.

No. 75 series 1900.
An ordinance for improving part of Frankfort avenue from center line of Cavewood avenue to the center line of Raymond Ave. extended
Board of councilmen June 16 1900. Sts. E. D. S. F. Harlan C. B. C.
Recommended by board of public works. C. F. Grainger, chairman.

12 *Contract for New Street Construction.*

Original.

Ordinance No. 75, series 1900.

This agreement, made the 3d day of July, 1900, between the City of Louisville, of the first part, and the Barber Asphalt Paving Company, principal, and Jacob Gast surety of the second part,

Witnesseth: that the said parties of the second part agree and bind themselves that the said The Barber Asphalt Paving Co. will improve the carriage-way of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended shall be forty (40) feet in width by grading, curbing, and paving, with the asphalt pavement according to the plans and specifications exhibited at letting No. 108 of July 2nd, 1900, and now on file in the office of the board of public works, required to be so improved by an ordinance passed by the general council of said city, and approved by its mayor on the 6th day of June, 1900, and entitled "An ordinance for improving a part of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, and that said work shall be done according to the provisions of the said ordinance and the plans and specifications above mentioned, all of which are made part hereof as fully as if the same were herein inserted; and that said work shall be completed within four (4) months after the approval of this contract, or within such time thereafter as shall be directed or allowed. But the city reserves the right to have said work suspended by the board of public works whenever, for causes satisfactory to them, they shall so direct; but such suspension shall be reported to the general council for approval.

For the said work the said Barber Asphalt Paving Co. is to be paid as follows:

Items.	Written prices.	Dollars.	Cts.
For excavation, per cubic yard.....	Twenty-six cents....	0	26
For embankment, per cubic yard.....	Ten cents..	0	10
For curved curbing, per lineal foot	Forty-seven cents....	0	47
For new curbing, per lineal foot..... ..	Seventy-eight cents..	0	78
For 18-inch diam. corner stones, each...	Three dollars.....	3	00
For jointing old curbing, each.....	.....	.....	.....
For 24-inch diam. corner stones, each...	Three dollars & fifty cents.	3	50
For new binder stones, per lineal foot...	Forty-five cents	0	45
For old binder stones reset, per lineal foot.			
For vitrified brick paving, with concrete foundation and cement joints, per square yard			
For granite block paving with concrete foundation and gravel joints, per square yard			
For granite block paving with concrete foundation and cement joints, per square of 100 square feet			
For asphalt paving with concrete foundation, per square yard	Two dollars.....	2	00

12*a* *Guarantee.*

The party of the second part hereby guarantees the work done under this contract and the materials used in the construction of the same are free from defects or flaws, and this guarantee is for a term of five years from and after the acceptance of the work by the board of public works.

It is hereby further stipulated and agreed that the board of public works shall be the exclusive judge of the existence of defects in the work or materials herein mentioned, and of the extent of the work necessary to remedy the same; and further, that the appointment of inspectors by the board of public works, for the supervision of same to insure that the work and materials are in accordance with the plans and specifications prepared by the board of public works for the improvement herein mentioned, and the supervision thereof by such inspector shall in no wise relieve the contractor from the guarantee of his work as herein set forth.

It is further stipulated and agreed by the contractor and his sureties that they will pay all damages for injuries to or encroachments upon the private property of abutting lot owners, or other persons, in constructing the improvement herein mentioned, and will save the City of Louisville harmless from all loss or damage on that account; and the contractor and his sureties shall, in no event, be released from such liability, unless the injury to private property was done by the contractor under and in pursuance of the express written order of the board of public works, certified by the secretary, and after reasonable notice in writing given by the board of

public works to the abutting lot owner or owners, or other person or persons to be affected, and it is agreed by the contractor and his sureties that no other authority whatever, verbal or written, shall release them from such liability to the city, nor to the owner of the property injured or damaged, nor waive the city's right to indemnity on account thereof.

It is further agreed by the contractor that for the contract price or cost of all work mentioned above or required to be done by him under any of the provisions of this contract, he will look alone to the lot owners of the property described in the ordinance aforesaid; and that, in no event, shall he be entitled to recover any part thereof from the City of Louisville.

In testimony whereof, the name of the said city is hereto subscribed and the seal thereof affixed, and the parties of the second part hereto subscribe their names, the day and year first above written.

BOARD OF PUBLIC WORKS OF THE CITY OF LOUISVILLE,
By C. F. GRAINGER, *Chairman.*
[SEAL.] CITY OF LOUISVILLE,
By CHARLES P. WEAVER, *Mayor.*
THE BARBER ASPHALT PAVING CO., *Contractor.*
L. B. WEST, *Att'y.*
JACOB GAST,
—— ——, *Sureties.*

Attest: THOS. P. CRAIG, *Secretary B. of P. W.*

A copy.
Attest: ALF. W. DAVIS, *C. B. A.*

This is a true and correct copy of the original on file in my office.
JOHN H. HANCOCK,
City Comptroller.

Resolved, by the general council of the city of Louisville, that the within contract is hereby approved.

S. F. HARLAN, *C. B. C.* THEO. STERN, *P. B. C.*
ALF. W. DAVIS, *C. B. A.* C. T. BALLARD, *P. B. A.*

Approved — day of Aug. 2d, 1900.
CHAS. P. WEAVER, *Mayor.*

Endorsed on back as follows: Ordinance No. 75, series 1900. Street contract asphalt pavement Frankfort avenue from the center line of Cavewood avenue extended *extended* to the center line of Raymond avenue extended. The Barber Asphalt Paving Co., contractor. Date July 3d, 1900.

Board of councilmen, July 31, 1900. Approved. S. F. Harlan, C. B. C.

Board of aldermen, July 31, 1900. Approved. Alf. W. Davis, C. B. A.

Board of aldermen, July 31, 1900. Contract committee. Alf. W. Davis, C. B. A.

Board of councilmen, July 31, 1900. Contracts. S. F. Harlan, C. B. C.

13 At a meeting of the board of public works of the city of Louisville, held at their office on the 21 day of February, 1901, it appearing that the Barber Asphalt Paving Co. contractor has completed his contract for improving Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, in all respects as required by his contract, and that said work has been duly and legally inspected and received by the chief engineer of the city as appears by his report made to this board, the following apportionment of the contract price of said work is now made by this board, and apportionment warrants are directed to issue in favor of the Barber Asphalt Paving Co. contractor against the various owners of property legally liable therefor for their respective proportion of the contract price of said work.

BOARD OF PUBLIC WORKS,
By C. F. GRAINGER, *Chairman.*

Chief engineer's office.

LOUISVILLE, KY., *Feb.* 21", 1901.

To the board of public works.

GENTLEMEN: The above named work was inspected after published notice on Dec. 22d, 1900, according to the provisions of the charter and the work was received as completed according to the plans, specifications, and ordinance concerning said improvement.

The Barber Asphalt Paving Co. contractor has completed his contract for improving Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, by grading, curbing and paving the carriageway with the asphalt pavement according to contract approved Aug. 5th, 1900.

Summary.

6932.6 cu. yds., excavation, at 26c	$1802.47
66.9 cu. yds. embankment, at 10c	6.69
3474.7 lin. f. new curbing, at 47c	1638.11
11-24 " corner stones, at $3.50	38.50
170.3 lineal ft. binders, at 45c	76.63
8206.3 sq. yds. asphalt pavement, at $2.00	16412.60
Total amount of contract	$19970.00

Which is apportioned among the following named owners of property as per list furnished by the city assessor:
"Over"

14 Northerly side.

John Ewald	Irregular	43582	sq. ft.	$1407.89
L. & N. R. R.	"	107507	"	3472.94
Lizzie Wisenberger	"	3716	"	120.04
Mary Leonard	"	4537	"	146.56
Theresa Laufer	"	7927	"	256.08
Lizzie Wisenberger	"	3333	"	107.67
Wm. Spect	"	19825	"	640.43
Carrie Kessack	"	11326	"	365.88
Wm. Spect	"	19629	"	634.10
Christopher Bader	"	4255	"	137.45
Margaretha Widman	"	17163	"	554.44
Mrs. J. E. Speed	"	6424	"	209.14
Constant Georgel	"	4349	"	140.49
Louis Behrens	"	1645	"	53.14
Frank Bauer	"	4792	"	154.80
Louis Behrens	"	8644	"	279.24
Sallie C. Murphy	"	9247	"	298.72
J. H. Thompson	"	229	"	7.40
J. T. Davis	"	14834	"	479.20
Thos. E. Fagan	"	9528	"	307.79
Thos. E. Fagan	"	242	"	7.82
Totals northerly side		302784	sq. ft.	$9781.22

Southerly side.

Jos. Rostetter	Irregular	5578	sq. ft.	$180.19
Eliz. A. Zabel	"	6978	"	225.42
Jennie T. Conroy	30 x 165.685	4970	"	160.55
Phillip, Rosa & Chas. Kelly	30 x 165.685	4970	"	160.55
Phil, Rosa & Chas. Kelly	30 x 165.685	4970	"	160.55
John Mayer	30 x 165.685	4970	"	160.55
Geo. Oswein	30 x 165.685	4970	"	160.55
Jas. Oswein	Irregular	9900	"	319.81
15 Mrs. Josephine Wiggington	35 x 165.85	5799	"	178.33
Jas. B. Miller	Irregular	13214	"	426.88
Wilhelmenia Hiller	"	10735	"	346.79
Michael Hubrick	"	5800	"	187.37
Jno. Reiner	60 x 195	11700	"	377.96
Henrietta Marx	30 x 195	5850	"	188.98
Chas. Fust	25 x 195	4875	"	157.48
Owen McCann	30 x 195	5850	"	188.98
Wilhelmenia Messer	30 x 195	5850	"	188.98
Nellie A. Kenney	30 x 195	5850	"	188.98
Isabella Tucker	28 x 195	5460	"	176.38
Jas. H. Tinsley	27 x 195	5265	"	170.08
J. H. G. Wallbaum	36′ 8½″ x 195	7158	"	231.23
G. F. & T. P. Raymond	Irregular	4909	"	158.58
Herman Kraus	"	22854	"	738.28
Herman Kraus	50 x 180	9000	"	290.74
Rosa Bucheser	50 x 180	9000	"	290.74
Harry R. Whitesides	Irregular	19897	"	642.76
G. F. & T. P. Raymond	"	8340	"	269.42
Constant Georgel	"	10688	"	345.27
Maggie Reiter	25 x 180	4500	"	145.37
Mary Reiter	25 x 180	4500	"	145.37
Chas. Heigold	50 x 180	9000	"	290.74

Lena Zender	50 x 180	9000 sq. ft.	290.
Hy. A. Kiefer	50 x 180	9000 "	290.
Frank A. Thoman	100 x 180	18000 "	581.
Geo. Hobbs	25 x 180	4500 "	145.
Jno. M. Schoen	25 x 180	4500 "	145.
Lucy J. Nichols	100 x 180	18000 "	581.
Lucy J. Nichols	50 x 180	9000 "	290.
Totals southerly side		315400 sq. ft.	$10188.

16 *Recapitulation.*

Northerly side	302784 sq. ft.	9781.
Southerly side	315400 "	10188.
Total amount of contract	618184 sq. ft.	$19970.

Correct,
E. F. MANDEVILLE, *Calculator.*

Very respectfully,
C. W. PARSONS,
Chief Engineer.

The above apportionment is approved this 21st day of February 1901.

C. F. GRAINGER,
Chairman B. of P. W.

A copy.
Attest: ALF. W. DAVIS.

This is a true and correct copy of the original on file in my office.

JNO. H. HANCOCK,
City Comptroller.

Endorsed on back:
"Engineer's apportionment Frankfort avenue from center lin of Covewood extended to center line of Raymond avenue extende The Barber Asphalt Paving Co. contractor Reported Feb'y 2 1901 Ent. Feb'y 21, 1901, Record Book No. 6, page 164. B. P. W Craig Ent. App't Ledger 12 pages 209–210 Roger W. McGrat Ent. Book 41, p. 576.

17 Said answer of the Louisville and Nashville Railroa Company, filed on the 12th day of October, 1901, is a follows:

Jefferson Circuit Court.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, &c., Defendant.

Answer of Louisville & Nashville Railroad Company.

Defendant, The Louisville & Nashville Railroad Company, denies that it is or at the institution of this action was the owner of a lot of land described in the petition as belonging to it or to any part thereof, except in the manner and to the extent hereinafter set forth.

Par. 2. Said defendant says it is a corporation created for the purpose of owning and operating a railroad under and by an act of the General Assembly of Kentucky, entitled "An act to charter the Louisville & Nashville Railroad Company," approved March 5th, 1850, and various acts amendatory thereof.

It says it does now own and for many years has owned a line of railroad extending from Newport, Ky., to and through Louisville, Ky., and thence southwardly through Kentucky and other States.

It owns and has long owned a perpetual right of way for railroad purposes from Newport to and into Louisville over a long strip of land which is about 110 miles long, and about 66 feet wide, on which is constructed its road-bed and over which are operated its trains between and into the cities aforesaid. Occasionally for short distances the width of the right of way as above given varies, but that given above is the usual width, and is its greatest width
18 at the place referred to in the petition herein. The said right of way passes over the parcel of land described in the petition herein as belonging to this defendant; in other words, it constitutes a section of said indivisible and continuous right of way between the cities aforesaid; and the only interest of defendant in said land is an easement therein, to-wit: the perpetual right of itself, its successors and assigns to the use of the same for railroad purposes as aforesaid, and should such use be abandoned all interest of this defendant, its successors and assigns in said land would cease. Over said parcel of land, which, as aforesaid, is, at its greatest width, only 66 feet wide, is constructed a section of defendant's road-bed between its terminal property in the city aforesaid, and on the same are laid two tracks, parallel with the northerly and southerly lines of said parcel of land described in the petition, constituting what is called a double track, and being parts of defendant's two main tracks between the cities aforesaid, over which are operated its trains between said cities. On said parcel of land there are no houses or buildings, but it is used only

and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its road-bed as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid.

Said parcel of land over which said right of way exists as aforesaid runs practically parallel with the section of the street described in the petition as herein as having been improved. The south line of said parcel of land over which the said right of way exists, and the north line of the said street are very close together, possibly in contact with each other, at the extreme eastern and western ends thereof, and while the south line of the said right of way is a straight line the north line of the street is a curved line, the concave side thereof being toward the line of said right of way; the
19 greatest distance between said two lines being about 105 feet which is at a point about half way between the eastern and western ends of the property and street described in the petition.

Defendant says neither said parcel of land described in the petition, nor any right or interest of defendant therein is or has been or will be or can be benefitted to the slightest degree by the improvement of Frankfort avenue as set forth in the petition herein. On the contrary, the existence of said avenue and the improvement thereof, which will lead probably to an increase in the use thereof being very close to the said right of way of defendant, is a positive injury to defendant and its said right of way, rather than a benefit. Said right of way could be more safely and advantageously used by defendant for the only purpose for which it does, or can ever use it if said Frankfort avenue was entirely removed from within the territory described in plaintiff's petition as a tax district, than it can with said avenue in said district.

Defendant says that to subject said parcel of land described in the petition, or defendant's interest therein, under the ordinance referred to in the petition, to the payment of any part of the cost of the improvement of Frankfort avenue, or to compel this defendant in any way to pay any part of the cost of improving said Frankfort avenue, otherwise than by means of a general tax laid equally and uniformly upon all taxable property in the city of Louisville, will be to deprive this defendant of its property without due process of law, and would deny to it the equal protection of the laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed.

HELM, BRUCE & HELM,
Attorneys for Louisville & Nashville Railroad Co.

20 —— —— says he is the — of the Louisville & Nashville Railroad Company, and its chief officer in the county of Jefferson, and that he believes the statements in the foregoing answer are true.

—— ——.

Subscribed and sworn to before me by —— —— this — day of October, 1901.

My commission expires ——.

—— ——.

At a court held on the 19th day of October, 1901:

This action was set at rules by the plaintiff on October 14th.

By agreement of the plaintiff and defendant City of Louisville the order entered herein on October 5th, 1901, submitting this action on the demurrer of the City of Louisville is hereby set aside.

Came plaintiff by counsel and filed a demurrer to the answer of defendant Louisville & Nashville R. R. Co.

Ordered that this action be and is submitted on pending demurrers.

Said demurrer filed on the 19th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING CO., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Demurrer.

21 The plaintiff demurs to the first and second paragraphs of the answer of the defendant, The Louisville & Nashville Railroad Company, herein, because neither of said paragraphs set forth facts sufficient to constitute a defense to the plaintiffs' cause of action herein.

WILLIAM FURLONG,
Att'y for Plaintiff.

At a court held on the 9th day of November, 1901:

The court being advised delivered a written opinion herein which is ordered to be and is now filed. The opinion herein being a copy of the opinion in the case of R. B. Park & Co. *v.* Katharine Orth, & others, it is ordered that the opinion in said case be and is adopted as the opinion in this case.

It is therefore ordered in conformity with said opinion that plaintiffs' demurrer to the answer of defendant Louisville & Nashville Railroad Co. and to the first and second paragraph- thereof be and the same is hereby sustained. To which said defendant excepts.

And further ordered that one week's time be and is given said defendant to amend its answer herein.

And further ordered that the demurrer of the defendant City of Louisville to the petition herein be and the same is hereby overruled. To which said defendant excepts.

22 Jefferson Circuit Court, Chancery Division.

R. B. PARK & COMPANY, Plaintiff, vs. CATHERINE ORTH ET AL., Defendants. } Opinion upon Demurrer to Answer of the L. & N. Railroad Company.

This is an action to collect the cost of constructing Frankfort avenue.

The answer of the Louisville & Nashville Railroad Company presents two defenses: First, that it owns a right of way *nearly*, within the taxing district, and that it is not liable for street improvements; and, second, that the road's right of way has not been benefitted by the improvement, but injured rather, "because it increases the liability to accidents and injuries therein, and the cost of maintenance of its said road-bed and said right of way; and said two parcels of land could be more safely and advantageously used by the defendant for the only purpose for which it does, or can ever use them, if said Frankfort avenue were entirely removed — within the tax district set forth in plaintiffs' petition, than they can with said avenue in said district."

These two defenses are presented in the second paragraph, and should have properly been presented in separate paragraphs; but as the petition is demurred to as a whole, it will be so treated. The first paragraph of the answer being a reserve or qualified traverse is insufficient when standing alone. The demurrer to the answer will have to be overruled if either defense set up in the second paragraph be found to be a bar to a recovery.

1. Is a right of way liable for its share of the cost of the
23 construction of the street? The answer concedes that this right of way is upon land lying within the taxing district. If this right of way is exempt from liability, then the remaining lands within the taxing district must pay this portion of the tax, which has been assigned to the railroad for payment. The road has exclusive possession and occupancy of this land, which it holds as a perpetual right of way. There is no claim that the assessment of the cost of the improvement is unfair or inequitable in amount, or that the work has not been done properly or according to contract; but only that the defendant road ought not to be required to pay any part of the cost of this improvement, because it owns a right of way *nearly*, and not the fee in the land which constitutes the right of way. I use the last expression advisedly, because for all practical purposes, and especially for the purpose of taxation, the right of way and the land which it occupies are one and the same thing. A distinction to the effect that the land is the tangible property, while the right of way over the land, and occupying it to the exclusion of others, is an intangible and different thing is too etherial for practical purposes when we come to distribute the public burdens. Our constitution and laws contemplate an attempt

to arrive at a uniformity of taxation and public burdens. Our courts are burdened with complaints against unequal public burdens imposed, and whenever it appears that the burden has been unfairly apportioned, or illegally imposed, the courts correct the wrong. The defense *here* presented here by the railroad is one of exemption. A complete exoneration from any portion of this public burden.

It is well settled that the exemption must clearly exist, and
24 that statutes granting exemptions are to be strictly constructed.

City of Louisville *v.* Board of Trade, 90 Ky., 409;
Kilgus *v.* Orphanage, 94 Ky., 439.

It is a personal privilege and cannot be transferred or assigned, even when it clearly exists, to a successor.

Commonwealth *v.* Masonic Temple Co., 87 Ky., 349;
Wells *v.* Savannah, 181 U. S.
Railroads *v.* Adams, 180 U. S., 26, *et seq.*

Section 170 of the constitution specifies that property is exempt from taxation, and further provides that "All laws exempting or committing property from taxation other than the property mentioned shall be void."

The exemption here claimed, is not claimed by virtue of any statute. And although the defendant's property might be exempted from the ordinary annual tax levy, it would nevertheless be liable for its share of the cost of a public street improvement, such as we have here.

Broadway Baptist Church *v.* McAtee, 8 Bush, 508;
Zable *v.* Louisville Baptist Orphans' Home, 92 Ky., 93.

But it is plain that the exemption or non-liability exists here because the defendant's right of way was never liable to be taxed for this improvement. This is but another way of stating the same proposition, for if the right of way cannot be taxed for this improvement, the inability to tax it, must arise from some exemption, which takes it out of the rule of taxation applicable to all property alike. The statute authorizing this improvement (sec. 2833, Ky. Statutes) provides that it "shall be made at the exclusive cost of the *owners of lots* in each fourth of a square, to be equally apportioned by the board of public works, according to the number *of square*
25 *feet* owned by them respectively."

It was suggested in argument that possibly the term "*lots*" so used did not refer to or include the right of way of a railroad, or so much thereof as was included in the fourth of a square. It seems clear, however, that the statute meant to impose the burden upon the amount of land in the quarter square according to the number of *square feet*, owned by each land owner, and the use of the word

"lots" is immaterial, since its meaning is thereafter defined by th statute.

The realty of a railroad is liable for its share of the cost of a stree improvement in like manner as the realty of an individual is liabl

In L. C. & L. R. R. Co. *v.* Obst & Stengel, Miss., opinion Februar 23, 1875 (a street warrant case), Judge Lindsay said:

"Real property held by railroad companies within the corporat limits of the city of Louisville, is not exempt from taxation. Th term of the grant of the power to tax for such purposes, includes al real estate and that held by railroad companies, like that held b churches, colleges and hospitals, and other institutions of like char acter, must bear its proportion of the local burden. There is n constitutional restriction upon the power of the legislature to im pose local taxation upon railroad companies. It is a mere questio of policy."

In the City of Ludlow *v.* Trustees of the Cincinnati Southern Rail way, 78 Ky., 357, decided March 4th, 1880, the court, in an opinio by Judge Hines, held that a lot upon the street owned by the sai railway company was subjected to an assessment for the improve ment of such street by the city of Ludlow, and the fact that the lo was the property of a railroad company, and used for railroa
26 purposes, furnish- no more reason why it should be exemp from an assessment than if it belonged to a natural person The same contentions were made in that case as are made by de fendant, L. and N. Railroad Company, in the second paragraph o its answer, viz: (1) That its property was not benefitted by theim provement, and (2) that it had been withdrawn from the ordinary use for which town lots are appropriated, and had become a part o the railway essential to its operation, and it was not within the pol icy of the law subjecting town lots to such local burden. There i appeared that the lot supported a portion of the masonary of the road bed, and was essential to the proper drainage of the tract. The as sessment was made on the lots in proportion to the number of front feet, and in accordance with the provisions of the charter of the city of Ludlow. With reference to the contention that the lot was necessary for the operation of the railway, and that it is contrary to public policy to subject it to such burdens, the court, after review ing the authorities cited by the railroad company's counsel, holding that the property of a railroad company could not be sold in parcels to satisfy a lien or tax, said (*ib.*, 362):

"These cases bear upon the case under considera tion in so far as to furnish *or* construction for statutes laying local burdens upon such *quasi* public corporations as railroads, but when the rule is ap plied to assessment for local improvement, where the statute directs that the property assessed be sold to satisfy the claim, and *directs the manner in which it shall be sold*, it will be found not to forbid the fragmentary sales against which those cases are directed."

Still further, in support of the conclusion reached, Judge Hines states (*ib.*, 362-63):

"But if there were any doubt on this point, we would not hesitate on the authority of the L. C. & Lex. R. R. Co. and the Louis-
27 ville Transfer Company *v.* Obst & Stengel, decided by this court in February, 1875, to hold that the property of the company should be sold to satisfy the assessment. In that case the *road-bed* and the grounds belonging to the company were directed to be sold to satisfy a sum assessed against the companies for street improvement, and under a charter of the city of Louisville, similar in this respect to the charter of the city of Ludlow. In the opinion in that case, which was delivered by Judge Lindsay, who delivered the opinion in the Elizabethtown and Paducah Railroad case, it is said: "Real property held by railroad companies within the corporate limits of the city of Louisville is not exempt from street taxation. The terms of the grant of the power to tax for such purposes includes all real estate, and that held by railroad companies, like that held by churches, colleges, hospitals, and other institutions of like character, must bear its proportion of the local burden. There is no constitutional restriction upon the power of the legislature to impose local taxation upon railroad companies. It is a mere question of policy."

Judge Hines then proceeds to quote authorities in other States, and concluded as follows:

"We think that, both upon reasons and authority, a lot held and owned by the railway company as this is held and used, is as much subject to assessment for street improvements as if it belonged to a natural person. In the law authorizing the assessment there is no exemption of railroad property, nor exemption of property because of its application to certain uses."

It will be observed that of the authorities cited and approved by the court of appeals in the opinion rendered by Judge
28 Hines, many of the cases — where the right of way of the railroad company was sought to be subjected to the assessment for local improvement. In the Ludlow case the lot sought to be subjected really formed a part of the railroad company's right of way, as it supported the masonary that upheld the tracks of the railroad company in the city of Ludlow. In other words, if it had been sold under the lien for the local assessment and purchased by a stranger, the railroad company's operation of its railroad would have been materially interfered with. But that fact does not appear to have formed any valid objection to the enforcement of the lien.

It is admitted in the company's answer in this case that it owned a perpetual right of way for railroad purposes from Newport to Louisville covering the land embraced by the local assessment sued on by plaintiffs herein. This perpetual right of way, practically amounts to the fee simple title. But it is unimportant what kind of title the defendant railroad company owns. All real estate within the area of the district to this local assessment, must stand the burden thereof.

The term "right of way" is defined as being "*the strip of land of* which a railroad company acquires either the ownership or the use for the laying of its tracks." (Century Dictionary, *verb* "way.") In common usage also the term means the land itself which is held and not the mere easement to use it in common with some one else.

It should be borne in mind that defendant's right of way is not the ordinary easement by which one man can go upon or across his neighbor's land in common with his neighbor; but it amounts to an exclusive appropriation of so much land which no one else can use in the way that the railroad uses it, or in any way to in-
29 terfere with the road's use of it. This amounts to an ownership of the present estate to continue at the will of the owner. It may be considered as settled that the owner of the estate for life must pay the cost of these public improvements.

5. Hackworth *v.* Louisville Artificial Stone Co., 20 Ky. L. R., 1789.

The answer states that the defendant has only a perpetual easement for railroad purposes, and should that use of the land be abandoned, the road's interest in the land would cease. It may also be said, that when the road's use and ownership in the land ceases, its obligation to pay the taxes thereon will also cease. While there is not entire uniformity in the cases upon this subject, the great weight of authority and reason sustains the view above given.

The Illinois Central Railroad Company *v.* East Lake Fork Special Drainage District Commissioners, 129 Illinois, 417, it was held that the assessment was enforcible against such railroad property. The supreme court of Illinois has repeatedly held that such local assessment was enforcible against the right of way of the railroad company.

41 Ill., 306;
60 *ib.*, 367;
90 *ib.*, 573;
32 Am. Rep., 54;
120 Ill., 104;
153 *ib.*, 649.

The Indiana supreme court has held likewise:
Penn. & I. R. R. Co., *v.* Hanna, 68 Ind., 562;
Indianapolis P. & C. R. Co. *v.* Ross., 47 Ind., 25.

The same principle has been established in other States.
30 Burlington & Mo. Ry. *v.* Spearman, 12 Iowa, 112;
New Haven *v.* Fair Haven & W. Ry. Co., 38 Conn., 422;
Columbus *v.* Street Ry. Co., 45 Ohio St., 98;
In re Cedar Park, How. Pr. N. S. (N. Y.), 257;
Appeal of North Beach *v.* M. R. Co., 32 Cal., 499;
City of Passaic, 54 N. J. L., 340;
42 N. J. L., 102;
Northern Indiana R. Co. *v.* Connelly, 10 O. St., 159;
Troy & L. R. R. Co. *v.* Kane, 9 Hun., 506;
1 S. Dak., 46.

The Illinois Central Railroad Company *v.* City of Decatur, 147 U. S., 190, it appeared that in 1887 proceedings were had in the county court of Macon county, in the State of Illinois, to defray the cost of grading and paving a certain street in the city of Decatur. Under those proceedings two separate parcels of land belonging to the Illinois Central Railroad Company and forming part of its right of way were assessed to the amount of $262.70. The company objected to this assessment. The objection was overruled, and a judgment entered by the county court against the two parcels of land. Exceptions were taken and an appeal allowed to the supreme court of that State. In that court the ruling of the county court was sustained, and the judgment affirmed, and the case was taken to the Supreme Court of the United States on a writ of error. It was contended by counsel for the plaintiff in error that the assessments were made without regard to benefits, or whether the property assessed for the cost of such improvement was benefitted thereby, and also that the road bed or right of way of a railroad company derived no special benefit from the paving of a
31 street which crosses it, and for that reason is not subject to assessment. The Supreme Court in an opinion by Mr. Justice Brewer, affirmed the judgment of the supreme court of Illinois, and held that the right of way was subject to the law for the cost of the improvement upon the theory that it benefitted thereby.

In the case of City of New Haven *v.* Fair Haven and Westville Railroad Company, 38 Conn., 422 (3 A. Ry. & C. A., 230), action was brought against a street railway to recover the amount of benefits assessed upon defendant for its proportionate part of the expense incurred in *paving a street in and through which the defendant's tract was laid.*

The defendant interposed a defense that it was not liable, and the city charter did not authorize an assessment upon defendant's property, its franchise or tracks in the street.

The statute authorized the court of common council to order the improvement, and when the improvement was executed :

" To assess upon the person whose property is especially benefitted a proportionate and reasonable part of the expense thereof, and may estimate the particular amount of such expense to be paid by such person," etc.

The property of defendant consists of rails, sleepers, ties and spikes laid into and attached to the soil in the street where the improvement was made to become a part of the realty.

The property was held to be real estate, and was liable to assessment, but the question as to the liability of the franchise was not passed upon.

In the case of City of Chicago *v.* Baer, 41 Illinois, 306, the common council of Chicago passed an ordinance to curb and pave Clark street. The real estate deemed benefitted by the improvement was assessed, and the assessment was reported to the council,
32 which approved it, and warrants issued for the cost thereof. Judgment against benefitted lots were asked and resisted,

and the court sustained the objection of lot owners, and refuse judgment, which was appealed.

A street railway company had possession of a considerable portio of the street by its road-bed, ties, rails, and cars, and no assessmer was made against the street railway company for any part of the in provement, although it seemed to have been largely benefitted b the improvement although the record did not disclose anything o that point. The railway was assessed because it was not considere liable by the city authorities for any portion of the expense, and th case was submitted on the single question: Was the railway com pany liable for any part of the expense, it being admitted that was benefitted by the improvement? The charter of the street rai way company authorized it to construct and operate a railway i the streets of Chicago upon such terms as might be agreed upon b the council. The council passed an ordinance by which terms wer fixed which were accepted by the railway company.

In a previous case, Chicago *v.* Larned, 34 Ill., 267, it was held tha all taxation, general and special, must be imposed equally, or in th ratio of benefits, and that rule was approved. In the Larned case it was insisted that the railway company had no real estate, but mere right of way, the court said:

"The position is ingenious, but unsound. The assessment mus be laid upon all property that is substantially and directly bene fitted. This necessarily excludes all personal property of a mov able nature. Its value cannot be affected by laying this pavement

But every estate in land adjacent to the street, whether in fe
33 or life, or for a term of years, may be increased in value. I adjacent property is held under a lease of fifty or a hundre years, the benefit to the property arising from replacing an old by new pavement would probably accrue wholly to the lessee.

The pavement would probably be worn out before the expiratio of the lease, and, therefore, the benefit which might accrue to th owner of the fee would be so uncertain and remote as not to b taken into the account. In a case of that character as between th lessee and the owner of the fee the former would undoubtedly b required to pay the entire assessment. Prettyman *v.* Walston, 3 Ill., 191.

Now, it is true, as urged by counsel, that the railway company has not become the owner of any portion of these streets in fee, bu it has certainly through its charter from the legislature, and it contract with the city, acquired a property in them of the most val uable character, which neither the legislature nor the city ca take away without the consent of the company, and capable, lik other property, of being sold and conveyed. The city council ha made a contract with the company by which it has granted to th latter what is substantially a lease hold interest in a portion of thi street for return by the original ordinance, of 25 years. The legis lature at its last session extended the character to ninety-nine years but whether the city council has extended the term for occupyin

the street, this record does not inform us. The terms offered by the city in its ordinance were formerly accepted by the company, and it executed a bond to the city, to secure compliance on its part. By this contract the railway company acquires the right to occupy a certain portion of the street by its ties, rails, and cars, so far
34 as may be necessary for operating the railway. It has acquired rights in the street which neither any other person or company, nor the general public, possessed. It can now occupy the street in a manner which would not be permitted without the aid of legislation. If a private individual were to occupy a street in this manner without authority from the city council, he would be liable to prosecution.

It is wholly unnecessary to define for the purpose of this case what is the precise extent or nature of its property.

Certain it is that this railway company has a franchise appurtenant to this street; that through this franchise it has a right of occupancy in a portion of the street peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and its right of occupancy together constitute a property fixed and immovable in its character, like realty, and is recognized and protected by the law as fully as a fee simple in land; that this property is of a character to be substantially and directly benefited by the proposed payment; and that in proportion as it is thus benefited it should contribute its share to the cost of the improvement in common with other property upon the street."

In Chicago City Railway Company *v.* City of Chicago, 90 Ill., 573, the street along and upon which the railway was operated was widened by condemnation proceedings at a cost of $84,299.62, which was apportioned among those benefited, and there was assessed an assessment of

"*$1686.00 on the right of way right of occupancy franchise and interest of the Chicago City Railway Company in State street, in the city of Chicago.*"

35 Which was for the benefit the company would derive by widening State street at the point and along which their track was laid and their cars were run.

The railway company objected to the assessment, which was confirmed and appeal taken by the company, which contended that it had no such property or title to property as was embraced in the city charter. The appellate court held the company liable for the assessment.

In Little *v.* City of Chicago, 46 Illinois Appeal, 534, the court said:

"When railway property is specifically benefited by an improvemen, it is not only the right *of way* but the duty of the municipal authority to include it in the assessment made upon the property benefited, and an omission to do so may render the assessment upon other property invalid."

Counsel for railroad company has cited two Iowa cases: City of Muscatine *v.* Railway Company, 88 Iowa, 291; Koons *v.* Lucas, 52 Iowa, 177.

These cases are not like our case, for they are founded on a different statute. In the Iowa cases the statute gave the council power,

"To levy a special tax on the lots and parcels of land *fronting on which highway or alley to pay the expense of such improvements.*"

Under that statute the assessment or cost is confined to land fronting the street, while under the Kentucky statute the cost is apportioned to every square foot within the prescribed territory.

In the Iowa case the street railway has a mere easement in the street, while in the case at bar there is no attempt to assess the land in the street, but to assess the land of railway company within the designated territory.

36 The cases of Chicago *v.* Baer, 41 Ill., 306, The City of New Haven *v.* F. H. & W. R. R. Co., 38 Conn., 4022, cited *supra*, have been approved by the court of appeals of Kentucky, for that court in the case of Ludlow *v.* Cincinnati Southern Railway Company, 78 Ky., 363, says in speaking of them:

"The rulings of the court of last resort in other States are almost uniformly in accord with the decision of this court upon this question."

And again, in the same case, the court said, in speaking of assessment of real property:

"In the law authorizing the assessment there is no exemption of railroad property or exemption of property because of its application to certain uses."

The exclusive "use of a perpetual right of way for railroad purposes," such as the defendant has, *in* in effect the same as a fee, and if the fee cannot escape, the easement should not. An easement can be sold and conveyed and the owner thereof can maintain an ejectment against squatters and trespassers, and the only limitation or difference between that easement and the fee — that when the railway company abandons its use, it reverts to the owner.

A railroad company has no right to hold property for other than railroad uses, such as right of way, etc., and if the road-bed or right of way was liable in the Obst case, there is no good reason why it should not be liable in this case.

As heretofore stated, the second defense is that:

"Neither of said parcels of land nor any right or interest of defendant is, or has been, or will be, or can be, benefited *by* the slightest degree by the improvement of Frankfort avenue."

37 The answer goes further, and specifies the reason why the improvement is an injury:

"Crossing defendant's said right of way at an acute angle, as it does, is a positive injury to the defendant and its said right of way rather than a benefit, *because it increases the liability to accidents and injuries thereon, and the cost of maintenance of its said road-bed* and

right of way: and said two parcels of *land could be more safely and advantageously used* by the defendant for the only purpose for which it does or ever can use them, if *said Frankfort avenue were entirely removed from within the taxed district* set forth in plaintiffs' petition, *than they can with said avenue in said district.*"

Waiving for the present, the precise question presented by this defense, the broader question of relative injuries and benefits arising from such improvements will *not* be noticed briefly.

The question of benefits is determined by the legislature, and cannot be raised, as is attempted to be done in this case, by the L. & N. R. R. Co. in the second paragraph of its answer. Being a matter for the legislature to determine, the courts will not interfere except in cases of spoilation. This has been frequently determined by our court of appeals.

McFerran *v.* Alloway, 14 Bush, 580;
Ludlow *v.* C. S. Ry. Co., 78 Ky., 357;
Preston *v.* Rudd, 7 Ky. L. R., 809;
Purdy *v.* Drake, 17 Ky. L. R., 819;
Allen *v.* Woods, 20 Ky. L. R., 60;
Bullitt *v.* Selvage, 20 Ky. L. R., 599;
Woodward *v.* Collett, 20 *ib.*, 1067.

38 In Justice Brewer's opinion, *supra*, on this point, speaking of the contracts between the Illinois Central Railroad Company and the State of Illinois *Central Railroad Company and the State of Illinois*, he says:

"There was nothing in the term of that contract to prevent the State from committing the final determination of the question of benefits to the city council rather than leaving the matter of ascertainment to a jury. And whether the charges are called special taxes or special assessments, and by whatever tribunal, or by whatever mode, the question of benefits may be determined, the fact remains that the charges are for a local improvement and cast upon the con*tingents* property upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge." (147 U. S., 208.)

The answer further alleges that the defendant will be deprived of its property without due process of law, and that it will be denied the equal protection of the laws, contrary to the provision of the 14th amendment of the Federal Constitution if its property be held for any part of the cost of this improvement.

It does not say why it would be so deprived, or wherein the defendant is denied the equal protection of the law. If it does not pay its share of this public improvement, it is easy to see that the other land owners might complain of unequal burden because their proportions of this tax would be increased — the defendant railroad.

In the oral argument, however, much stress was laid upon the case of Norwood *v.* Baker, 172 U. S., 269, as authority for holding this assessment unenforcible under the allegation of the answer

that that defendant has been injured and not benefited
39 this improvement. I do not deem it necessary to go int
discussion of that case, or the latter case of French *v.* Barb
Asphalt Company, 181 U. S., 324, because the act under which
work was done expressly provides that the general council or
courts in which suit may be brought "shall make all correctio
rules and orders to do justice to all parties concerned." (Ky., s
2834.)

This section is but a repetition of the former charter of the c
of Louisville which was held in Walston *v.* Nevan, 128 U. S., 5
to be*ing* constitutional, and not in violation of the fourteen
amendment to the Federal Constitution, because it did not affo
the parties due process of law.

That decision has been followed at least six times by the U.
Supreme Court, viz:

Palmer *v.* McMahon, 133 U. S., 669;
R. R. Co. *v.* Penn., 134, I. B., 240;
District *v.* Bradling, 164 *ib.*, 175–177;
R. R. Company *v.* Ellis, 165 *ib.*, 155;
Braunan *v.* Rose, 167 *ib.*, 689, 690;
Holden *v.* Hardy, 169 *ib.*, 384.

The question was again considered in French *v.* Barbour, *sup*
and very elaborately by our court of appeals in the very late ca
of Barfield *v.* Gleason, 23 Ky. L. R., 128 (decided after French
Barbour was decided), and with the result that our statute w
again upheld as not being violative of the fourteenth amendmen
the statute being constitutional, the only way to avoid the t
under this answer would be to show some peculiar and extraor
nary hardship which amounts to actual confiscation of the defen
ant's private property to the public use, within the rule as la
down in Preston *v.* Rudd, 84 Ky., 156. That rule, as a
40 nounced by Judge Holt, is as follows:

"Such assessments are made upon the assumption that
portion of the community are benefited by the improvement, th
principle is that the territory is benefited; that it has a commo
interest, and that, governed by equitable rules, it must equally be
the burden. Necessarily individual cases of hardship will arise
but it approaches equality as nearly as is practicable. It follow
that a lot owner may be compelled to pay his proportion of the co
of an improvement although in his particular case the property ma
not be benefited.

This rule, however, cannot be so extended as to entirely take fro
the citizen his property. This would work 'a manifest injustice
It would be spo*il*ation, and not taxation. Under the guise
benefit and taxation, he cannot be thus arbitrarily deprived of h
property.

It would be but an appropriation of it by the exercise of arbitrar
power to public use without compensation."

If the answer in this case has stated facts showing injury to defendant by reason of the construction of the street, the demurrer thereto would have been overruled, in order that evidence might be heard upon that issue with the view of doing justice to all parties by correcting the apportionment if necessary. But the answer does not show any damage in its specification. It only claims that it is not benefited by the *improvement* of Frankfort avenue, but the said *improvement* is an injury because *the avenue crosses the right of way at an acute angle, which fact increases the liability to accidents, and the cost of the maintenance*,—presumably in the way of additional watchmen. It is further specified that the company could
41 use the ground more safely and advantageously "*if said Frankfort avenue were entirely removed from within the tax district;*" but it is not stated why, unless it be inferred from the preceding reference to accidents and expense of maintenance. A fair construction of this language of the answer warrants the conclusion that defendant is compelled to have a watchman at said crossing, but it is not alleged, that this necessity has either arisen or grown by reason of the improvement of the street. It is nowhere alleged that the grade of the street has been changed, or that the construction of the street has put any additional burdens upon the defendant company.

If the defendant had found it necessary to have a guard at this crossing before the street was constructed, and its grade remained substantially the same, it is difficult to see how it has been damaged by the improvement or construction of what was formerly a country turnpike road into a street of the city. All these allegations of the answer, taken in their strongest terms, apply to the conditions of affairs, which existed before the improvement was made, equally as well as to its present condition.

Furthermore, if by reversing the rule applicable to the construction of pleadings, we would view the answer in the light in which it could be most favorable to defendant, and conclude that Frankfort avenue was now for the first time extended across defendant's right of way in the usual and ordinary way, it is exceedingly doubtful whether the injury complained of is to be considered in determining the question of comparative benefits and injuries caused by the construction of the street. Is it not rather one of those incidental injuries arising out of the necessary growth of the city in population and in the extent of its limits which every citizen must bear from the very necessity of the situation? If the rail-
42 road and the turnpike have intersected for years, as they now do, and the travel and growth in population have made it necessary for the company to have a guard there for the prevention of accidents, certainly the mere improvement of the turnpike by putting down curbstones and paving it with asphaltum is no injury to the company.

It must show special damage by reason of the construction and improvement of the street, not damage or mere inconvenience by

reason of the existence of the street, which would be equally tru
of any street or road, crossing a railroad track in a thickly settle
community. It is, however, argued that it must be conceded tha
a right of way is the one species of property that can derive n
possible benefit from street improvements. That is a proposition o
fact, rather than of law, and being a question of fact, I should b
slow either to affirm or deny its correctness in the absence of testi
mony.

It might be easy, however, to imagine a state of affairs — which the construction or improvement of a road or street might be very bene ficial to a railroad, and also to its right of way, if it be insisted that they are different properties. If the defendant had a station for receiving and discharging freight or passengers, at or near this crossing, an increase in the facilities for getting to and from the station would certainly be beneficial to the company.

Other citizens and property holders are benefited in the same way, in the increased facilities for travel presented by the good road or street. I cannot agree to the proposition that the law presumes, or declares as a matter of law, that the road bed or
43 the right of way of a railroad company is not benefited by the improvement of a contiguous street. If any presumption arises, it is the presumption which arises in such cases against individuals generally, namely, that benefits have accrued to the adjoining property. Any other view must rest upon the erroneous assumption that the road-bed and the right of way do not constitute parts of the property of the railroad company. As before stated, however, it is not necessary to decide that question now, because the answer is defective in not showing what new or additional injury it has suffered by reason of the improvement or construction of the street, not the injury it states by reason of the existence of the street and the crossing. In the absence of an allegation, the court cannot presume that the condition of affairs, which exists by reason of the crossing, etc., was brought about by the improvement or construction of the street. The language of the answer rather indicates that the present condition and alleged injury is of long standing.

The demurrer to the answer will therefore be sustained; with leave to amend, if it is so desired.

SHACKELFORD MILLER, *Judge.*

44 At a court held on the 30th day of November, 1901:

This action was set at rules by the plaintiff on the 25th inst.

On motion of defendants, by counsel, it is ordered that this action be and is remanded to the rules.

At a court held on the 7th day of December, 1901:

This action was set at rules by the plaintiff on the 2nd inst.

Came the defendant by counsel and filed its amended answer herein.

Ordered that this action be and is remanded to the rules.

Said amended answer filed on the 7th day of December, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING CO., Plaintiff, vs. LOUISVILLE & NASHVILLE RAILROAD Company, &c., Appellees. } Amendment to Answer of Louisville & Nashville Railroad Company.

The Louisville and Nashville Railroad Company, for amendment to its answer herein, says the territory contiguous to Frankfort avenue, and north thereof, between Cavewood avenue and Raymond avenue is now, and was at all the times mentioned in the petition herein, defined into squares by principal public streets; and
45 that the principal public street next north of Frankfort avenue between the streets aforesaid, is much more than 390 feet distant therefrom.

Wherefore defendant prays as heretofore.

HELM, BRUCE & HELM,
Att'ys for Defendant L. & N. R. Co.

At a court held on the 21st day of December, 1901:

Notice being waived, came plaintiff by counsel and filed a reply to the amended answer herein.

Said reply filed on the 21st day of December, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, vs. LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Reply.

The plaintiff, by way of reply to the amended answer of the defendants, The Louisville & Nashville Railroad, filed herein on December 7, 1901, denies that the territory contiguous to Frankfort avenue or north thereof, between Cavewood and Raymond avenue is now or was at all or at any of the time mentioned in the petition herein, defined into squares by principal public streets.

Wherefore, the plaintiff prays as in *his* petition herein.

WILLIAM FURLONG,
Att'ys for Plaintiff.

46 At a court held on the 25th day of January, 1902:

This action was set at rules by the plaintiff on the 20th inst.

On motion of defendant, by counsel, ordered that this action be and is remanded to the rules.

At a court held on the 1st day of February, 1902:
This action was set at rules by the plaintiff on January 27th.
Ordered that this action be and is submitted.

At a court held on the 15th day of March, 1902:
The court being advised, delivered a written opinion, which is ordered to be and is now filed and made part of the record herein.

47 Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING Co., Plaintiffs,
vs.
L. & N. R. R. Co., Defendant.
} Opinion.

The apportionment of the cost of the improvement of Frankfort avenue is the only question argued upon this submission.

Frankfort avenue, as here improved, extends in an irregular line from Clifton avenue eastwardly to Ewing avenue, a distance (in a straight line) of about 1,750 feet. This territory on the north is intersected by two cross streets, Keats avenue and Jane street, running northwardly and southwardly. Keats avenue is 455 feet west of Ewing avenue; Jane street is 459 feet west of Keats avenue; while Clifton avenue is about 790 feet west of Jane street.

It is claimed by the defendant that Sycamore street is the next principal street north of Frankfort avenue, and that the taxing district on the north should extend one half the distance from Frankfort avenue to Sycamore street as required by section 2833 of the Kentucky Statutes. Sycamore street is not parallel with Frankfort avenue. On Ewing avenue, the distance from Frankfort avenue to Sycamore street is 435 feet; on Keats avenue, the distance is 555 feet; on Jane street, the distance is 680 feet, while on Clifton avenue the distance from Frankfort avenue to Sycamore street is 720 feet; on the south the next principal street to Frankfort avenue is Payne street, which is distant 380 feet from Frankfort avenue. The
48 apportionment sued on fixes the taxing district 190 feet on the east side of Frankfort avenue. It is conceded that the south line of the taxing district is properly fixed at 190 feet south of Frankfort avenue, which is one-half the distance to the next principal street on the south; but it is insisted that in fixing the taxing district on the north, it should extend half the distance from Frankfort avenue to Sycamore street, instead of only 190 feet, as has been done.

The precise question here presented, if we are to consider Sycamore street as a principal street, was decided in Cooper *v.* Nevin, 90 Ky., 85, where it was decided that the taxing district should extend back half way to the next principal street, although the depth on one side should be greater than on the other side. In that case the taxing district on the south side of Bank street extended only 210 feet, which was half the distance to St. Xavier street, while on the

north side, the court of appeals fixed the north line of the taxing district at a point 320 feet from Bank street, which was half way from Bank street to Portland avenue, and the next principal street. But it is claimed by the plaintiff, Sycamore street is not a dedicated street of the city of Louisville; that the territory on the north side of Frankfort avenue is not surrounded by principal streets, and is not a square within the meaning of the statute, and that therefore the principle laid down in Cooper *v.* Nevin *supra*, does not control this case. This territory was lately annexed to the city of Louisville. It has been laid off and platted with streets and alleys, as it *not* appears, while it yet remained in the county.

The only evidence as to the dedication of Sycamore street is found in the testimony of Daniel F. Murphy, assessor for the city of Louisville, who says it is so treated by his department, and he files a map which shows Sycamore street to be a regular
49 dedicated street of the city of Louisville. The question of dedication is often a nice one, and difficult of determination. In the case at bar the two eastern squares have been divided into building lots with appropriate streets and alleys and many sales have been made with reference to those public ways. It must be conceded that any abutting property owner has the right to keep these streets and alleys open for public use. It is not primarily a question of dedicated streets. It is rather a question of the existence of a principal street for the purpose of fixing a proper taxing district which will place the burden equitably.

Mr. Murphy says that in fixing this district, the city has never allowed the question of acceptance of a dedication of a street to interfere. In my opinion, that is the proper view of the question; and in considering this question, Sycamore street will be treated as a principal street of the city.

In Cooper *v.* Nevin, 90 Ky., 85, 88, the court said:

"Each sub-division of territory, bounded on all sides by principal streets, is ordinarily deemed a square, and such is the provision of the city charter; still, the territory between the streets may be of such dimensions covering a large area, as would show not only the necessity, but the certainty, that such a-area must at some times be subdivided into squares for public convenience, and, therefore, the city council in ordering the improvement, will only extend the taxing district as far into the territory that is liable to this sub-division as that taxed on the opposite side of the improvement, where the territory has already been defined into squares surrounded by principal streets as contemplated by the charter."

50 The territory, being bounded as principal streets, the charter provision should apply as claimed by defendant, unless the square extending from Frankfort avenue to Sycamore street is "of such dimension as to authorize the conclusion that it was never contemplated that a territory embracing so much land in one square should be deemed a square within the meaning of the law." Nevin *v.* Roach, 86 Ky., 499. This rule is based upon the theory that, in

all probability, the territory will be further cut up by principa streets, thereby making new taxing districts. The ordinary squar is 420 feet long. In the case at bar the three squares range fron 435 feet to 720 feet in depth. In Nevin *v.* Roach, *supra*, the distance from Chestnut to Walnut street was about 744 feet, and it was held not to be so excessive as to violate the rules, while in Dunlap *v* Gosnell, 18 Ky. L. R., 8, the same ruling was held, although in tha case the territory extended about 1,400 feet.

As to the two eastern blocks—from Ewing avenue to Jane street—there can be no reasonable doubt that the charter rule should be applied both on account of this comparatively small excess over an ordinary square, and their present condition as to streets, alleys and varied ownership. Mr. Murphy testified, and it is easily seen from the plat, that it is not probable that any new streets or alleys will ever be laid off in these two eastern blocks. The testimony is otherwise, however, as to the western square bounded by Clifton avenue on the west and Jane street on the east. This block will average about 700 feet in each of its four sides, has no street or alley laid off within its bounds, and only three small lots adjoining each other and fronting on Clifton avenue have been sold. The remainder of the square may be treated as acre property. The supposition, however, that this square will sometime be sub-divided by other principal streets is entirely conjectural, 51 both as to time and the manner of its sub-division. We are not advised as to how many streets may be laid out, or the direction in which they may or will probably run. If there should be one new street laid out, and it should run northwardly and southwardly from Frankfort avenue to Sycamore street, it would in no way affect the correctness of this apportionment, or a similar apportionment for the construction of Sycamore street.

There are no streets abutting against this square, which by an imaginary extension would enable the court to say, with any reasonable probability, that they would hereafter divide this square into a different taxing district, as was the case in Dumesnil *v.* Shanks, 97 Ky., 356, and other similar cases. This doctrine is unsatisfactory at best, both upon principle and in its application; and when viewed in connection with the well settled principle announced in Beck *v.* Obst, 12 Bush, 268, requiring all the property in a square to pay for all the improvements in or to the square, the doctrine is unnecessary. When the fact is well established that any territory is bounded by principal streets, the letter of the charter should control in fixing the taxing district, and when strictly applied as to the construction of these principal streets, as in this case, exact justice is event-ly worked out, since all the property in the two quarter squares pays equally for the construction of the street fronting upon those quarter squares respectively, and any other streets or alleys that may be subsequently laid out within the territory. In applying the rule to this case, I am of opinion that each of these three blocks or squares should be treated independently in fixing the

taxing district. (Cooper *v.* Nevin, 90 Ky., 93.) It does not appear that a different result would be reached by treating them as
52 a continuous tract, or that an unequal proportion of the cost has fallen upon any one square, but it might be different by reason of the irregular course of Frankfort avenue. Each square should bear its own burden only.

In Dumesnil *v.* Shanks, 97 Ky., 358, the court says:

"One of the cardinal and controlling considerations underlying this whole question is based on the idea that the property benefited by the improvement should bear the expense of it, and that the decision in each case must be governed to some extent by the facts of that case."

The plaintiff may have a judgment enforcing its lien, to be apportioned against the property embraced in a taxing district extending back one-half the distance from Frankfort avenue to Sycamore street.

——— ———, *Judge.*

March 15th, 1902.

53 At a court held on the 10th day of April, 1902:

Came the parties by counsel and this action having been heard on plaintiff's motion to set aside the submission herein, and for leave to file its amended petition, and the court being advised, it is ordered that said motion be and is overruled. To which plaintiff excepts.

At a court held on the 14th day of June, 1902:

Came the plaintiff, by counsel, and tendered and moved the court to enter a judgment herein. To which the defendant objects.

Notice being waived, came the defendant by counsel and tendered and moved the court to file an amended answer herein. To which the plaintiff objects.

Ordered that said motions be and are assigned to the 17th inst. for hearing.

At a court held on the 17th day of June, 1902:

Came the defendant by counsel and moved the court to set aside the submission herein, and to file an amended answer which was ordered on the 14th inst. To which the plaintiff objects. And the court being advised, it is ordered that said motion be and is overruled, to which the defendant excepts.

And it is ordered that said amended answer be and is made a part of the record herein for the purpose of appeal.

53a Said amended answer is as follows:

Jefferson Circuit Court, Chancery Division #1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.
} Amended Answer.

Defendant, The Louisville & Nashville Railroad Company, for amendment to its answer herein, says that plaintiff herein, to-wit: The Barber Asphalt Paving Company, in addition to instituting this suit against this defendant seeking to subject a portion of its right of way to the payment of part of the cost of constructing Frankfort avenue within the limits described in the petition, to-wit: from Cavewood avenue to Raymond avenue, also instituted another suit in the Jefferson circuit court, entitled The Barber Asphalt Paving Company, plaintiff, *v.* William Specht &c., defendants, No. 29263, in which latter suit the said Barber Asphalt Paving Company sought to subject the lands of a large number of persons made defendants therein, more than twenty in number, and owning various parcels of land within the alleged tax limits defined by the ordinance pleaded in the present suit to the payment of part of the cost of improving the same section of Frankfort avenue which is involved and described in this present suit against this defendant, to-wit: the section of Frankfort avenue between Cavewood avenue and Raymond avenue. The ordinance directing the improvement of said Frankfort avenue, and the contract for the improvement of the same, involved in said action of The Barber Asphalt Paving Company *v.* William Specht, &c., were the same ordinance and contract that are involved in this present action against this defendant; and the tax limits within
53b which the property was alleged in the suit of The Barber Asphalt Paving Company *v.* William Specht, &c., to be liable for the payment of the improvement of the aforesaid section of Frankfort avenue were the same as the tax limits described in this present suit as being the limits within which the property is liable for said improvement. But defendant says that since the delivery of the court's opinion in the present suit against this defendant filed herein March 15th, 1902, to the effect that the alleged apportionment of the cost for the improvement of said street was improper and unlawful, the court has adjudged in the said action of The Barber Asphalt Paving Company *v.* William Specht, &c., that the said apportionment which was the same as the apportionment herein involved, was unlawful, and that it is not within the power of the court to order or make a re-apportionment of the said cost of the said improvement of Frankfort avenue between Cavewood avenue and Raymond avenue, and has by its said judgment which was entered

on May 21st, 1902, dismissed the petition therein of said plaintiff The Barber Asphalt Paving Company as against all the defendants therein who were owners of property within the tax limits aforesaid, and has adjudged that the City of Louisville alone is liable to the said Barber Asphalt Paving Company for the cost which had been sought to be apportioned against the properties of said individual owners within said tax limits. Said judgment has never been reversed or set aside, and is still in full force and effect.

Defendant further says that the property described in the petition as amended in said case of Barber Asphalt Paving Company *v.* William Specht, &c., and which was sought therein to be subjected to payment of part of the cost of said improvement, and
53c which the court has adjudged cannot be subjected to the payment of any part of said cost, embraces nearly 240,000 square feet of land, which is largely more than one-third of the entire property embraced within the limits of said tax district as fixed by the said ordinance providing for the improvement of the said section of Frankfort avenue. And defendant says, it having been adjudged that the said lands are not subject, and cannot be subjected, to the payment of any part of the cost of said improvement, it would be unjust and inequitable to subject the property of this defendant, or any other property in said tax district, to the payment of any part of the cost of said improvement. And to do so would be to deprive this defendant of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the provisions of the Constitution of the United States, and especially of the fourteenth amendment thereto.

Wherefore, defendant prays that the petition of plaintiff herein as against this defendant be dismissed.

HELM, BRUCE & HELM,
Att'ys for Def't.

Walker D. Hines says he is the first vice president of the defendant The Louisville & Nashville Railroad Company, and its chief officer now in this State, and he believes the statements of the foregoing amended answer are true.

WALKER D. HINES.

Subscribed and sworn to before me by Walker D. Hines this 14th day of June, 1902. My commission expires January 28th, 1906.

[SEAL.]

G. W. B. OLMSTEAD.
Notary Public.

54 At a court held on the 17th day of June, 1902:

This action having been heard in chief on the pleadings and proof herein, and the court being advised, it is ordered and adjudged:

1. That the territory contiguous to Frankfort avenue and on the north side thereof from Clifton avenue to Ewing avenue is defined into squares by principal streets bounded on the north by Sycamore Ave. and that the law, independent of the ordinance prescribes that the property in the quarter squares contiguous to said improvement is liable for the cost of said improvement.

2. It is adjudged that the apportionment of the cost of said improvement as made by the board of public works is erroneous and the same is set aside and held for naught in so far as the same affects the Louisville and Nashville Railroad Company, and that William W. Crawford is appointed special commissioner to re-apportion the cost of said improvement in accordance with the provisions of this judgment.

3. It is adjudged that in the re-apportionment of the cost of said improvement the commissioner charge the cost of each separate square to the four quarter squares binding thereon, and for that purpose treat the first piece as running from Clifton avenue to Rastetter avenue, extended, the second as running from Rastetter avenue, extended, to Jane street, the third from Jane street to Hupe lane, and Keats street, and the fourth from Hupe lane and Keats street to Raymond avenue and Ewing avenue.

4. It is adjudged that said re-apportionment be made at the cost of the defendant, City of Louisville.

55 At a court held on the 9th day of October, 1902:

Came William W. Crawford, special commissioner, and produced in court his report, which is ordered to be and is now filed and laid over one week for exceptions. And said commissioner also filed a map marked Exhibit B, with said report.

Said report of special commissioner filed on the 9th day of October, 1902, is as follows:

56 Jefferson Circuit Court, Chancery Division, Branch No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	# 29790. Report of Special Commissioner.

In obedience to a judgment entered herein appointing William W. Crawford a special commissioner to reapportion the cost of improving Frankfort avenue from the center line of Cavewood avenue extended, to the center line of Raymond avenue extended, I wish to make the following report.

Acting under the provisions of the judgment herein, I made a survey of the work done under the contract let by the board of

public works, and divided said contract into four taxing districts in order to apportion the cost of said improvement as provided by law.

The taxing districts are as follows:

1. From the center line of Cavewood avenue, extended, to the center line of Rastetter avenue, extended from the south.

2. From the center line of Rastetter avenue, extended from the south, to a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue.

3. From a line connecting a point where the northerly curb line of Frankfort avenue intersects center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue to a line connecting a point where the northerly curb line of Frankfort avenue intersects
57 the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue.

4. From a line connecting point where the northerly curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue to the center line of Raymond avenue extended.

In obedience to the judgment, I apportioned the cost of each district to the contiguous quarter squares, treating Rastetter avenue as if extended from the south in order to arrive at the territory liable for the first and second districts as above set out.

The division of quantities used in the following report were obtained by an actual survey in the field, and the use of the city engineer's notes made at the completion of the contract.

The following is a detail report of each individual bill under the re-apportionment, and shows the number of square feet owned by the property owner within the taxing districts, and the amount of material used in each district.

The map filed herewith shows the territory covered by the improvement, and the quarter squares liable are indicated by the red lines.

58 First district.

Frankfort avenue from the center line of Cavewood avenue extended to the center line of Rastetter avenue, extended from the south.

Summary.

1761.2 cubic yards excavation at 26 cents	$457.91
785.3 lineal feet new curbing at 47 cents	369.09
1-24 inch corner stone, at $3.50.	3.50
37.8 lineal feet binder stone, at 45 cents	17.01
1887.6 square yards asphalt paving at $2.00	3775.20
Total taxing district No. 1	$4622.71

Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter *square feet of ground owned by them respectively within the quarter* squares contiguous to the improvement.

South west ¼ squares.

John Ewald	Irregular	30063	sq. ft.	$804.48
L. & N. R. R. Co.	"	17965	"	480.74
Lizzie Weissenberger	"	3716	"	99.44
Mary Lenord	"	1208	"	32.33
Total S. W. ¼ square		52952	sq. ft.	$1416.99

South east ¼ square.

John Ewald	Irregular	28000	sq. ft.	749.28
L. & N. R. R. Co.	"	12287	"	328.80
Mary Leonard	"	236	"	6.31
Mary Leonard	"	3070	"	82.34
Theresa Laufer	"	7927	"	212.13
Lizzie Weissenberger	"	1425	"	38.13
Total S. E. ¼ square		52952	sq. ft.	$1416.99

59 North west ¼ square.

Adam Keifer	Irregular	8269	square feet.	$221.27
Jennie T. Conroy	30 x 180.46	5414	"	144.88
Philip, Rose & Chas. Kelly	180 x 46	5414	"	144.88
(Same)	30 x 180.46	5414	"	144.88
John Mayer	30 x 180.46	5414	"	144.88
Elizab. Osewein	Irregular	3497	"	93.58
Totals N. W. ¼ squares		33422	square feet.	$894.37

North east ¼ square.

Elizab. Osewein	Irregular	1918	square feet.	$51.23
Jos. Osewein	"	10788		288.68
Josephine Wigginton	35 x —	6317		169.04
Jos. B. Miller	Irregular	14399		385.31
Totals N. E. ¼ square		33422	square feet.	$894.36

Recapitulation.

South west ¼ square	52952	square feet.	$1416.99
South east ¼ squares	52952	"	1416.99
South west ¼ squares	33422	"	894.37
North east ¼ squares	33422	"	894.36
Total district No. 1	172748	"	$4622.71

Cost per square foot $0.026759846

Second district.

Frankfort avenue from the center line of Rastetter avenue extended from the south to a line connecting a point where the northerly curb line of Frankfort avenue intersects the center lane of Jane street with a point where the southerly line of Frankfort avenue intersects the center line of Burkenmeyer avenue.

Over.

60

Summary.

552.2 cubic yards excavation at 26 cents	$143.57
63.3 cubic yards embankment at 10 cents	6.33
780 lineal feet curbing, at 47 cents	366.60
3–24 inches corner stone, at $3.50	10.50
40.5 lineal feet binder stone, at 45 cents	18.22
1853 square yards asphalt paving at $2.00	3706.00
Totals taxing district No. 1	$4251.22

Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the squares contiguous to the improvement.

South west ¼ square.

John Ewald	181.74 x 176.36	32084	square feet.	$677.11
L. & N. R. R. Co.	181.74 x 76	13812	"	291.49
Lizzie Weissenberger	Irregular	3487	"	73.59
Wm. Spect	"	12794	"	270.01
Totals S. W. ¼ square		62177	square feet.	$1312.20

South east ¼ square.

John Edwald	174.26 x 176.536	30763	square feet.	$649.23
L. and N. R. R. Co.	174.26 x 76	14003	"	295.52
Wm. Spect	Irregular	6524	"	137.69
Carrie Kessack	"	10887	"	229 76
Totals S. E. ¼ square		62177	square feet.	$1312.20

North west ¼ square.

Wilhelmina Hiller	Irregular	10665	square feet.	$225.0
Carolina Leonhard	"	5762	"	121.6
Jno. Reiner	"	11818	"	249.4
Henrietta Marx	"	6013	"	126.9
Chas. Fust	"	4050	"	85.4
Totals N. W. ¼ square		38308	square feet.	$808.4

61

North east ¼ square.

Chas. Fust	Irregular	1000	square feet.	$21.1
Owen McCann	"	6107	"	128.8
Wilhelmina Messer	"	6158	"	129.9
Nelly A. Kenny	"	6210	"	131.0
Jas. H. Tinsley	"	5842	"	123.2
Jas. H. Tinsley	"	5676	"	119.7
J. H. G. Wallbaum	"	7784	"	164.2
Totals N. E. ¼ square		38777	square feet.	$818.3

Recapitulation.

South west ¼ squares	62177	square feet.	$1312.2
South east ¼ squares	62177	"	1312.2
North west ¼ squares	38308	"	808.4
North east ¼ squares	38777	"	818.3
Totals taxing district No. 2	201439	square feet.	$4251.22

Cost per square foot, $0.021104254

Third district.

Frankfort avenue from a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue to a line connecting a point where the northern curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue.

Summary.

1790 cubic yards excavation, at 26 cents	$465.40
3.6 cubic yards embankment, at 10 cents	.36
819.8 lineal feet curbing, at 47 cents	385.31
4–24 inch corner stones, at $3.50	14.00
49 lineal feet binder stone, at 45 cents	22.05
1935.9 square yards asphalt paving at $2.00	3871.80
Totals taxing district No. 3	$4758.92

62 Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter squares contiguous to the improvement.

South west ¼ square.

Thos. J. Fitzgerald	31.32 x 200	6264	square feet.	$157.20
Ellen Hyde	50 x 200	10000	"	250.95
Christopher Bader	50 x 200	10000	"	250.95
L. & N. R. R. Co.	224.89 x 66	14834	"	372.49
Wm. Spect	Irregular	19871	"	498.66
Margaretha Widman	"	1384	"	34.73
Totals S. W. ¼ square		62362	square feet.	$1564.98

South east ¼ square.

Chas. F. McCaffrey	Irregular	4480	square feet.	$112.43
Constant Georgel	"	6213	"	155.92
Sallie M. Woodsmall	"	10550	"	264.75
Mrs. J. E. Speed	"	6446	"	161.77
L. & N. R. R. Co	"	16616	"	416.98
Margaretha Widman	"	19206	"	481.98
Totals S. E. ¼ square		61511	square feet.	$1593.82

North west ¼ square.

Herman Kraus	Irregular	21957	square feet.	$551.02
Herman Kraus	"	9105	"	228.49
G. F. & T. P. Raymond	"	770	"	19.32
Wm. Mueller	.92 x 180	16	"	.40
Totals N. W. ¼ square		31848	square feet.	$799.23

North east ¼ square.

G. F. & T. P. Raymond	163.658 x 15	2455	square feet.	$61.61
Wm. Muller	49.908 x 180	8984	"	225.46
Harry R. Whitesides	113.75 x 180	20475	"	513.82
Totals N. E. ¼ square		31914	square feet.	$800.89

63 *Recapitulation.*

South west ¼ squares	62362	square feet.	$1564.98
South east ¼ square	63511	"	1593.82
North west ¼ square	31848	"	799.23
North east ¼ square	31914	"	800.89
Totals taxing district No. 3	189635	square feet.	$4758.92

Cost per square foot, $0.025095156.

Fourth district.

Frankfort avenue from a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue to the center line of Raymond avenue extended.

Summary.

2829.2 cubic yards excavation, at 26 cents	$735.59
1089.6 lineal feet curbing, at 47 cents	512.11
3–24 inch corner stones, at $3.50	10.50
43 lineal feet binder stone, at 45 cents	19.35
2529.8 square yards asphalt paving at $2.00	5059.60
Totals taxing district No. 4	$6337.15

Which is the apportionment among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter squares contiguous to the improvement.

South west ¼ squares.

Jennie Ewing Speed	Irregular	3571 square feet.	$106.93
J. H. Thompson	"	4635 "	138.78
Sallie C. Murphy	"	9627 "	288.26
Louis Behren	"	8045 "	240.89
L. and N. R. R. Co.	"	15671 "	469.24
Louis Behren	"	2476 "	74.13
Frank Bauber	"	8644 "	258.83
Totals S. W. ¼ square		52669 square feet.	$1577.06

64

South east ¼ square.

Thos. E. Fagan	Irregular	1678 square feet.	$50.24
Thos. E. Fagan	50 x 194.76	9938 "	291.58
J. T. Davis	75 x 194.76	14607 "	437.38
L. and N. R. R. Co.	Irregular	17415 "	521.46
Frank Bauber	"	1971 "	59.02
Louis Behrens	"	2137 "	63.99
Jennie Ewing Speed	"	344 "	10.30
J. H. Thompson	24.88 x 17.57	437 "	13.08
Sallie C. Murphy	49.76 x 17.57	874 "	26.17
Louis Behrens	39.81 x 17.57	699 "	20.93
Totals S. E. ¼ square		49900 square feet.	$1494.15

North west ¼ square.

G. F. & T. P. Raymond	Irregular	2339	square feet.	$70.04
G. F. & T. P. Raymond	70.296 x 15	1054	"	31.56
Constant Georgel	Irregular.	10733	"	321.38
Maggie Reiter	25 x 180	4500	"	134.74
Mary Reiter	25 x 180	4500	"	134.74
Chas. Heigold	50 x 180	9000	"	269.49
Lena Zehnder	50 x 195	9750	"	291.94
Hy. A. Kiefer	50 x 180	9000	"	269.49
Frank A. Thoman	20.269 x 180	3653	"	109.38
Totals north west ¼ square		54529	square feet.	$1632.76

North east ¼ square.

Frank A. Thoman	79.704 x 180	14347	square feet.	$429.59
Geo. Hobbs	25 x 180	4500	"	134.74
Jno. M. Schoen	25 x 180	4500	"	134.74
Lucy J. Nuchols	100 x 180	18000	"	538.98
Lucy J. Nuchols	50 x 180	9000	"	269.49
G. F. & T. P. Raymond	279.704 x 15	4196	"	125.64
Totals north east ¼ square		54543	square feet.	$1633.18

65 *Recapitulation.*

South west ¼ square	52669	square feet.	$1577.06
South east ¼ square	49900	"	1494.15
North west ¼ square	54529	"	1632.76
North east ¼ square	54543	"	1633.18
Totals taxing district No. 4	211641	square feet.	$6337.15

Cost per square foot, $0.029942922.

Grand Recapitulation.

Taxing district No. 1	172748	square feet.	$4622.71
Taxing district No. 2	201439	"	4251.22
Taxing district No. 3	189635	"	4758.92
Taxing district No. 4	211641	"	6337.15
Totals	775453	square feet.	$19970.00

I file herewith as part hereof a copy of the judgment ordering the re-apportionment, and appointing me special commissioner to make the same, marked Exhibit "A." I also file a map showing the re-apportionment as made under the orders herein, marked Exhibit "B."

I respectfully ask the court to allow me one hundred and fifty (150) dollars for my service herein as special commissioner, to be paid by the City of Louisville in accordance with the terms of the judgment.

All of which is respectfully submitted.

WILLIAM W. CRAWFORD.
Special Commissioner.

66 Exhibit filed with the foregoing report is as follows:

"EXHIBT H."

STATE OF KENTUCKY, }
County of Jefferson. }

Jefferson Circuit Court, Chancery Branch, Division No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
L. & N. R. R. COMPANY, Defendant. } # 29790. Judgment

At a court held on the 17th day of June, 1902.

This action having been heard in chief on the pleadings and proof herein, and the court being advised, it is ordered and adjudged:

1. That the territory contiguous to Frankfort avenue and on the north side thereof from Clifton avenue to Ewing avenue is defined into squares by principal streets bounded on the north by Sycamore avenue, and that the law, independent of the ordinance, prescribes that the property in the quarter squares contiguous to said improvement is liable for the cost of said improvement.

2. It is adjudged that the apportionment of the costs of said improvement as made by the board of public works is erroneous, and that the same is set aside and held for naught in so far as the same affects the Louisville & Nashville Railroad Company, and that William W. Crawford is appointed special commissioner to re-apportion the cost of said improvement in accordance with the provisions of this judgment.

3. It is adjudged that in the re-apportionment of the cost of said improvement the commissioner charge the costs of each separate square to the four quarter squares binding thereon, and for that purpose treat the first piece as running from Clifton avenue to Rastetter avenue extended, the second as running from Rastetter avenue extended, to Jane street, the third from Jane street to Hupe lane, and Keats street, and the fourth from Hupe lane and Keats street to Raymond avenue and Ewing avenue.

4. It is adjudged that the re-apportionment be made at the cost of the defendant, City of Louisville.

A copy.
Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

67 Jefferson Circuit Court, Chancery Division, Branch No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.
29790. Oath of Special Commissioner.

The affiant, William W. Crawford, being duly sworn, says, that he will perform the duties of special commissioner in the above styled action under the orders thereof to the best of his ability, impartially and honestly.

WILLIAM W. CRAWFORD.

Subscribed and sworn to before me this 4th day of October, 1902, by William W. Crawford.

My commission expires on the 27th day of Jan., 1904.

R. N. KRIEGER,
Notary Public, Jefferson County.

68 At a court held on the 16th day of October, 1902:

On motion of Wm. *M.* Crawford, the report of the special commissioner herein having lain over one week and no exceptions having been filed thereto, it is ordered that the same be and is hereby confirmed in each and every particular.

And the special commissioner is allowed the sum of one hundred and fifty dollars for his services herein, to be paid by the city of Louisville, and taxed as costs.

At a court held on the 13th day of December, 1902:

This action was set at rules by the plaintiff on the 8th inst.

Came the defendant, City of Louisville, by counsel, and filed his answer herein.

And on motion of plaintiff, by counsel, it is ordered that this action be and is remanded to the rules.

Said answer of the City of Louisville filed on the 13th day of December, 1902, is as follows:

Jefferson Circuit Court, Chancery Branch, 1st Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD Company and City of Louisville, Defendants.

Answer of City of Louisville.

69 1st. par. The defendant, City of Louisville, for answer plaintiff's petition herein denies that by the contract fil with plaintiff's amended petition October 12, 1901, and sued herein, this defendant bound or obligated itself that plaintiff shou be paid for the work mentioned therein, or any part thereof, at t rates or prices therein named, or any rate or price, by this defen ant.

2nd par. This defendant for further answer herein, states that the express terms of the contract for the improvement of the ca riage way of that part of Frankfort avenue from the center line Cavewood avenue extended to the center line of Raymond avenu extended, dated July 3, 1900, sued on by plaintiff herein, as d scribed in plaintiff's petition, it was agreed and provided by th plaintiff as contractor for said work, that for the contract price cost of all work mentioned in said contract or required to be don by it under any of the provisions of said contract, the plaintiff woul look alone to the lot owners or the property described in the ord nance referred to in said contract, or in plaintiff's petition, and th plaintiff further covenanted and agreed by the terms of said con tract that it in no event should be entitled to recover any part said contract price or cost from this defendant. A certified cop of said contract is filed with plaintiff's amended petition as afore said and is referred to as part hereof. This defendant states tha under said provisions of said contract this defendant is not liabl for any part of the cost of the work mentioned in plaintiff's pet tion and plaintiff is bound to look alone to the lot owners or th property described in said ordinance according to the apportion ment of the cost aforesaid for the amount of the contract price fo said improvement or the cost thereof, and is not entitled to recove any part of the same from this defendant in any event.

70 Wherefore this defendant prays hence to be dismissed with its costs, and for all other relief to which it in equity may ap pear to be entitled.

H. L. STONE,
City Attorney.

At a court held on the 16th day of May, 1903:

This action was set at rules by the plaintiff on the 11th inst.

On motion of plaintiff, by counsel, it is ordered that this action be and is submitted.

At a court held on the 20th day of June, 1903:

71 This action having been submitted on pleadings and exhibits, and the court being advised, it is now considered and adjudged that the plaintiff, the Barber Asphalt Paving Company, has a prior and superior lien on the lots of land hereinafter described belonging to the defendant, Louisville & Nashville Railroad Company, to secure the amounts hereinafter set forth.

1. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at the intersection of the center line of Clifton avenue with the north line of the right of way of the Louisville & Nashville railroad, running thence eastwardly along the north line of said right of way 257.12 feet, thence at right angles with said north line of said right of way 66 feet to the south line of said right of way, thence at right angles to said last mentioned line and with the southern line of said right of way 287.28 feet to the center line of Clifton avenue, thence with the center line of Clifton avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien upon the said lot to secure the sum of $480.74 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

2. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point marking the northeastern corner of the track described and marked No. 1, running thence with the northern line of the right of way of the Louisville — Nashville railroad 174.66 feet,

72 thence at right angles with the last mentioned line northwardly 10 feet, thence at right angles with the last mentioned line eastwardly 10 feet, thence at right angles with the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with the said south line of the said right of way westwardly 184.66 feet to the eastern line of the tract above described as No. 1, thence with said eastern line to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the lot of land to secure the sum of $328.80 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

3. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville & Nashville railroad at a point common to the northeast corner of the lot above described as No. 2, running thence with said north line of the said right of way eastwardly 181.74 feet, thence at right angles to the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of the said right of way westwardly 181.74 feet,

thence at right angles to the said southern line of said right of way and northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot of land to secure the sum of $291.49 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

4. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville &
73 Nashville Railroad Company, and bounded and described as follows: Beginning in the northern line of the right of way of the Louisville and Nashville railroad at a point common to the northeastern corner of the tract above described as No. 3, running thence with the said northern line of said right of way eastwardly 174.26 feet to the center line of Jane street, thence with said center line of Jane street south 76 feet to the southern line of the right of way of the Louisville and Nashville road, thence with said southern line of said right of way and at right angles to Jane street westwardly 174.26 feet, thence at right angles to said south line of said right of way northwardly 76 feet to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the said lot of land to secure the sum of $295.52 with interest from Oct. 16, 1902, and $—, said lot's proper proportion of the cost of this action.

5. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Jane street intersects the northern line of the right of way of the Louisville and Nashville railroad, thence with said northern line of said right of way eastwardly 224.89 feet, thence at right angles to said northern line of said right of way southwardly 66 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of said right of way westwardly 224.89 feet, thence at right angles to said south line of said right of way northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum
74 of $372.49 with interest from October 16, 1902, and —, said lot's proper portion of the cost of this action.

6. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville and Nashville railroad at a point common to the northeast corner of the lot above described as No. 5, running thence with the north line of the said right of way westwardly 218.31 feet to the center line of Keats avenue, thence with said center line of Keats avenue southwardly to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 229.89 feet to the east line of the tract herein described as No. 5, thence with said line northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and

superior lien on said lot of land to secure the sum of $416.98 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

7. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center point of Keats avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with said north line of said right of way eastwardly 259.03 feet, thence southwardly with a line parallel to Ewing avenue to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 271.74 feet to the center line of Keats avenue, thence with the center line of Keats avenue northwardly to the point
75 of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $469.24 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

8. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Ewing avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with the north line of the said right of way westwardly 235.93 feet, thence southwardly with a line parallel to said center line of Ewing avenue to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of the said right of way eastwardly 225.93 feet, to the center line of Ewing avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot to secure the sum of $521.46 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

It is further considered and adjudged that each of the lots above described is indivisible without materially impairing the value of such lots, and each of said lots will therefore be sold as a whole.

For the purpose of satisfying the lien held by plaintiff against the lots of land above described as hereinbefore set forth it is adjudged that each of the above pieces of property shall be sold, and the commissioner of this court is hereby ordered and directed to sell at public auction each of the lots aforesaid. The said sale shall shall occur on some Monday at or about the hour of 11
76 o'clock a. m. at the court house door of the court house in Jefferson county, Kentucky.

Before making the sale herein directed, the commissioner will advertise the same by printed hand bills setting forth the time, place, and terms of sale, to be posted one at the court house door, and one on or near the premises herein offered to be sold; said bills to be posted for at least ten days prior to the day of sale. In addi-

tion the commissioner shall advertise said sale by a brief noti published in the Louisville Courier Journal for four days, includi Sunday, next preceding the day of sale, setting forth the time, pla and terms of sales herein ordered to be made.

Each of the lots of land herein described shall be sold separatel and each of said sales shall be made on a credit of six and twel months, the purchaser to execute bonds with good surety beari interest from the day of sale until paid; a lien shall be retained o the property sold as additional security. The purchaser of each l will be required to make a cash deposit of $25.00 at the time of t acceptance of his bid in order to insure compliance therewith.

The property sold herein will be conveyed to the purchaser su ject to all taxes that may be held against it by the city, county an State, and all sales will be made subject to such tax lien, if an exist.

At a court held on the 30th day of July, 1903:

Came the defendant Louisville & Nashville Railroad Compan by counsel and prayed an appeal to the court of appeals from th judgment entered on June, 1903, which appeal is hereby granted.

77 And on the 4th day of August, 1903, the following super sedeas bond was filed in the clerk's office:

COMMONWEALTH OF KENTUCKY,
Jefferson County.

Jefferson Circuit Court, Chancery Branch, First Division.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
against
BARBER ASPHALT PAVING CO. & CITY OF LOUISVILLE, Appellees.

Appeal from a judgment of this court rendered the 20th day o June, 1903.

Whereas said appellant has taken an appeal from the judgment of this court rendered on the 20th day of June, 1903, against Louisville & Nashville Railroad Company in favor of appellees Barber Asphalt Paving Company and City of Louisville for adjudging superior lien on certain lots of land mentioned and described in judgment to secure certain sums of money amounting to about $3,176.72 with interest and costs and adjudging sale of them, which judgment is in words and figures as follows:

Over.

78 This action having been submitted on pleadings and exhibits, and the court being advised, it is now considered and adjudged that the plaintiff, The Barber Asphalt Paving Company,

has a prior and superior lien on the lots of land hereinafter described belonging to the defendant, Louisville & Nashville Railroad Company, to secure the amounts hereinafter set forth.

1. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at the intersection of the center line of Clifton avenue with the north line of the right of way of the Louisville & Nashville railroad, running thence eastwardly along the north line of said right of way 257.12 feet, thence at right angles with said north line of said right of way 66 feet to the south line of said right of way, thence at right angles to said last mentioned line and with the southern line of said right of way 287.28 feet to the center line of Clifton avenue, thence with the center line of Clifton avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien upon the said lot to secure the sum of $480.74 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

2. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point marking the northeastern corner of the track described and marked No. 1, running thence with the northern line of the right of way of the Louisville — Nashville railroad 174.66 feet, thence at right angles with the last mentioned line north-
79 wardly 10 feet, thence at right angles with the last mentioned line eastwardly 10 feet, thence at right angles with the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with the said south line of the said right of way westwardly 184.66 feet to the eastern line of the tract above described as No. 1, thence with said eastern line to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the lot of land to secure the sum of $328.80 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

3. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville & Nashville railroad at a point common to the northeast corner of the lot above described as No. 2, running thence with said north line of the said right of way eastwardly 181.74 feet, thence at right angles to the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville and Nashville railroad, thence with the said south line of the said right of way westwardly 181.74 feet, thence at right angles to the said southern line of said right of way and northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot of land to

secure the sum of $291.49 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

4. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville &
80 Nashville Railroad Company, and bounded and described as follows: Beginning in the northern line of the right of way of the Louisville and Nashville railroad at a point common to the northeastern corner of the tract above described as No. 3, running thence with the said northern line of the said right of way eastwardly 174.26 feet to the center line of Jane street, thence with said center line of Jane street, south 76 feet to the southern line of the right of way of the Louisville and Nashville road, thence with said southern line of said right of way and at right angles to Jane street westwardly 174.26 feet, thence at right angles to said south line of said right of way northwardly 76 feet to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the said lot of land to secure the sum of $295.52 with interest from Oct. 16, 1902, and $—, said lot's proper proportion of the cost of this action.

5. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Jane street intersects the northern line of the right of way of the Louisville and Nashville railroad, thence with said northern line of said right of way eastwardly 224.89 feet, thence at right angles to said northern line of said right of way southwardly 66 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of said right of way westwardly 224.89 feet, thence at right angles to said south line of said right of way northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has
a prior and superior lien on said lot of land to secure the
81 sum of $372.48 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

6. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville and Nashville railroad at a point common to the northeast corner of the lot above described as No. 5, running thence with the north line of the said right of way westwardly 218.31 feet to the center line of Keats avenue, thence with said center line of Keats avenue southwardly to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 229.89 feet to the east line of the tract herein described as No. 5, thence with said line northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $416.98 with

interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

7. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Keats avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with said north line of said right of way eastwardly 259.03 feet, thence southwardly with a line parallel to Ewing avenue to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 271.74 feet to the center line of Keats avenue, thence with the center line of Keats avenue northwardly to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $469.24 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

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8. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Ewing avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with the north line of the said right of way westwardly 235.93 feet, thence southwardly with a line parallel to said center line of Ewing avenue to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of the said right of way eastwardly 225.93 feet, to the center line of Ewing avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot to secure the sum of $521.46 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

It is further considered and adjudged that each of the lots above described is indivisible without materially impairing the value of such lots, and each of said lots will therefore be sold as a whole.

For the purpose of satisfying the lien held by plaintiff against the lots of land above described as hereinbefore set forth it is adjudged that each of the above pieces of property shall be sold, and the commissioner of this court is hereby ordered and directed to sell at public auction each of the lots aforesaid. The said sale shall occur on some Monday at or about the hour of 11 o'clock a. m. at the court house door of the court house in Jefferson county, Kentucky.

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Before making the sale herein directed, the commissioner will advertise the same by printed hand bills, setting forth the time, place, and terms of sale, to be posted one at the court house door, and one on or near the premises herein ordered to be sold: said bills to be posted for at least ten days prior to the day of sale. In addition, the commissioner shall advertise said sale by a brief notice published in the Louisville Courier Journal for 4 days, including

Sunday, next preceding the day of sale, setting forth the time, pl
and terms of sales herein ordered to be made.

Each of the lots of land herein described shall be sold separat
and each of said sales shall be made on a credit of six and twe
months, the purchaser to execute bonds with good surety, bear
interest from the day of sale until paid; a lien shall be retained
the property sold as additional security. The purchaser of each
will be required to make a cash deposit of $25.00 at the time of
acceptance of his bid, in order to insure compliance therewith.

The property sold herein will be conveyed by the purchaser s
ject to all taxes that may be held against it by the city, county a
State, and all sales will be made subject to such tax lien, if any ex
and the appellant desires to supersede said judgment.

Now we, Louisville and Nashville Railroad Company, princip
do hereby covenant to and with the appellees, Barber Asphalt Pa
ing Company and City of Louisville, that the appellant will pay
the appellees all costs and damages that shall be adjudged agai
the appellant on the appeal, and also that they will satisfy and p
form the said judgment in case it shall be affirmed, and a
84 judgment or order which the court of appeals of Kentuc
may render, or order to be rendered by the inferior cou
not exceeding in amount or value the judgment aforesaid, and al
pay all rents, hire or damage which during the pendency of t
appeal, may accrue on any part of the property of which the app
lees are kept out of possession by reason of the appeal.

Witness our hands this 4th day of August, 1903.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, [SEAL.]
By HELM, BRUCE & HELM, *Att'y-*. [SEAL.]
ATILLA COX, [SEAL.]
By HELM BRUCE, *Att'y in Fact.* [SEAL.]

Attest: JNO. H. PAGE, *Clerk.*

BARBER ASPHALT PAVING CO.
vs.
LOUIS. & NASH. R. R. CO.

Whereas, the Barber Asphalt Paving Company has lately reco
ered a judgment for about $3,200.00 and interest in the case
Barber Asphalt Paving Company, plaintiff, *v.* Louisville & Nas
ville Railroad Company, &c., defendants, in the circuit court
Jefferson county, Kentucky, and said Louisville and Nashvil
Railroad Company has prayed an appeal from said judgment to th
court of appeals of Kentucky,

I, Atilla Cox, of the county of Jefferson and State of Kentucky
hereby appoint and constitute Helm Bruce, Esq., of Louisvill
Jefferson county, Kentucky, my true and lawful attorney in fact t

execute for me and in my name the necessary appeal and
85 supersedeas bond as surety for said company pending said appeal.

This 31st day of July, 1903.

ATILLA COX.

Witness:

L. W. BOTTS.

And thereupon the clerk issued supersedeas and copy, which said supersedeas is as follows:

STATE OF KENTUCKY,
Jefferson County.

Jefferson Circuit Court.

BARBER ASPHALT PAVING CO. and CITY of Louisville, Appellees,
versus
LOUISVILLE AND NASHVILLE RAILROAD Co., Appellant.
} Supersedeas. # 28790.

I, John H. Page, clerk of the Jefferson circuit court, in the county and State aforesaid, do hereby certify that an appeal has been granted *from* this court from a judgment obtained by Barber Asphalt Paving Company and City of Louisville against Louisville and Nashville Railroad Company adjudging superior liens on certain lots of land mentioned and described in said judgment to secure certain sums of money amounting to about $3,176.72 and interest and costs and adjudging sale of said lots, in the Jefferson circuit court, chancery branch, first division, on the 20th day of June, 1903, and that a supersedeas bond has been executed after the appeal was granted. Therefore, the appellees and all others are commanded to stay proceedings on the judgment aforesaid.

86 Witness, John H. Page, clerk of said court, this 4th day of August, 1903.

JOHN H. PAGE, *Clerk.*

Sheriff's return on foregoing supersedeas is as follows:

Came to hand Aug. 5th, 1903, at 12:30 p. m.
Executed Aug. 5/1903 on City of Louisville by delivering a copy of the within supersedeas to Charles F. Grainger, mayor of said city.

E. T. SCHMITT, *S. J. C.*,
By W. B. THIXTON, *D. S.*

Executed Aug. 5, 1903, on the Barber Asphalt Paving Co. by d
livering a copy of the within supersedeas to Wm. Furlong, attorn
for said Barber Asphalt Paving Company, and he accepting servi
See acceptance hereon.

E. T. SCHMITT, *S. J. C.*,
By JNO. TARLTON, *D. S.*

Service accepted Aug. 5th, 1903.

THE BARBER ASPHALT PAVING CO.,
By WM. FURLONG, *Att'y.*

87 Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD CO., Defendant. } No. 2927

The deposition of D. F. Murphy, taken by agreement, before m
on the 30th day of January, 1902, at the office of Messrs. Heln
Bruce & Helm, in the Louisville Trust Company building, Loui
ville, Ky., to be read in evidence on behalf of defendant in abov
styled case.

D. F. MURPHY, being duly sworn and examined by Mr. Bruc
deposed as follows:

1. Mr. Murphy, you are the assessor of the city of Louisville, a
you not?

A. I am.

2. And have been such for many years?

A. Yes, sir.

3. Do you not keep in your office as a part of the public records
the city of Louisville, plats showing the location of streets an
highways, and of the divisions of blocks of property into lots?

A. I have such maps in my office.

4. I will ask you if you have in your office plat showing the loc
tions of streets north of Frankfort avenue from Clifton avenue o
the west to Ewing avenue on the east, and the divisions of the block
of property between those streets?

A. I have.

5. Have you at my request made a copy of the plats in you
office showing the property referred to in my preceding que
tion?

88 A. I have.

6. If you have such a plat with you, please file it wit
your deposition and make it a part hereof, and state whether or n
it is a correct copy?

A. This is the plat made showing the property and streets in th
district specified. I file it as a part of my deposition, marked "E
hibit A."

7. What is the first principal street in the city of Louisville north of Frankfort avenue between Clifton avenue on the west and Ewing avenue on the east?

A. Sycamore street.

8. What is the width of that street?

A. Fifty feet in width.

9. What street-, if any, are there between Clifton avenue and Ewing avenue?

A. Jane street and Keats street.

10. What are the widths of those streets?

A. Jane street is forty feet wide; Keats street fifty feet wide.

11. Does this plat which you have filed with your deposition correctly show the locations and widths of streets in the territory mentioned, and the divisions of blocks into lots?

A. It does.

12. And correctly show the locations and widths of alleys in the territory?

A. It does.

13. Mr. Murphy, state whether or not in your judgment, there is any probability of the blocks bounded on the north by
89 Sycamore street, on the south by Frankfort avenue, on the west by Keats street, and on the east by Ewing avenue, ever being divided up, by the running of another street between Frankfort avenue and Sycamore street?

A. I do not think that any street will ever be run through the block specified other than those that are now there.

14. Please answer the same question as to the block bounded on the north by Sycamore street, on the south by Frankfort avenue, on the west by Jane street, and on the east by Keats street?

A. I do not think that there will ever be any other street running through that block.

15. Please answer the same question as to the block bounded on the north by Sycamore street, on the south by Frankfort avenue, on the east by Clifton street, and on the west by Jane street.

A. I think it is probable that the block will be divided by other streets.

16. Do you know of any present purpose or intention to thus divide the block?

A. I do not.

17. State whether or not there is a principal street south of Frankfort avenue, and practically parallel with it, between Cavewood street on the west and Raymond avenue on the east; if so, what that street is?

A. There is such a street running practically parallel with Frankfort avenue between the points specified, and that street is known as Payne street.

18. What is the difference between Frankfort avenue and Payne street, if you remember?

A. I do not remember the difference but it is about the ordinary distance between streets in the city of Louisville.

90 19. How do Clifton street to the north of Frankfort avenue and Cavewood avenue to the south of Frankfort avenue, intersect Frankfort avenue with reference to each other?

A. Well, the intersection is made without any regard to each other at all—some distance apart.

20. Does Clifton avenue run south of Frankfort avenue?

A. No; it does not run south of Frankfort avenue.

21. Does Cavewood avenue run north of Frankfort avenue?

A. It does not.

22. Well, do not Cavewood avenue from the south of Clifton avenue from the north intersect Frankfort avenue a very short distance apart?

A. Yes; some little distance apart.

23. Cavewood avenue being slightly to the west of Clifton avenue?

A. Yes.

24. Can you state approximately the relations of Raymond avenue on the south, and Ewing avenue on the north of Frankfort avenue, as to their intersections with Frankfort avenue?

A. They are almost opposite each other.

Cross-examined by Mr. FURLONG:

25. Mr. Murphy, you have been speaking of squares north of Frankfort avenue, bounded by Keats avenue and Ewing avenue, contiguous to Frankfort avenue. What is a square or block according to your idea?

A. I regard the squares or blocks between Ewing avenue, Keats avenue, Frankfort avenue and Sycamore street as being about an ordinary block in point of size.

26. What I mean is, what is necessary to constitute a block—must it not be surrounded by four streets?

A. By four streets.

91 27. Is the block betwoen Ewing and Keats, Frankfort and Sycamore so bounded by streets?

A. Yes.

28. You say it is?

A. I do.

29. Isn't it a fact that the Louisville and Nashville Railroad Company owns a right of way the whole length of this territory?

A. It is.

30. Is there a public street across their right of way?

A. No; the street is not dedicated across their right of way. Their right of way runs through this block that I specified.

31. It shuts off or breaks at Keats avenue, doesn't it?

A. Keats avenue is dedicated from Frankfort avenue northwardly to the line of the Louisville and Nashville Railroad Company, and across the line of the railroad company it is not dedicated. It be-

gins again on the north side of the railroad company and continues on through by dedication to the next street, Sycamore street.

32. That is also true of Ewing avenue and Jane street, is it not?

A. It is.

33. So those two squares or blocks are not bounded their whole length on each side by principal streets, are they?

A. Yes; I regard them as being bound by four principal streets with the exception that I stated before—that the railroad company runs through the block and cuts off the dedication so far as the width of the railroad company is concerned.

34. Then across the line occupied by the railroad company's
92 right of way, there is no Jane street or Keats avenue or Ewing avenue, is there?

A. No; it is not dedicated across the railroad company's right of way—neither of the streets are dedicated across it.

35. And for the length of the width of that right of way, those blocks are not bound by a principal street, are they?

A. I have to answer that as I did before—that I regard those two blocks as being bound by streets with the exception that the streets, so far as the right of way of the railroad company is concerned, is not dedicated.

36. That being true that the streets are not dedicated across that strip of ground, there is no street along there, is there?

Question objected to on the ground that the witness has fully answered it two or three times, and has stated the facts exactly as they exist.

A. Jane street does not cross the Louisville and Nashville Railroad Company; neither does Keats or Ewing, but with that exception, the two blocks are surrounded by streets.

37. The question was asked you, and that which I desire you to answer, is whether or not there is any street along what would be Jane street and Ewing avenue and Keats avenue if they were extended across the right of way of the Louisville and Nashville Railroad Company—if there is any street along there now?

A. There is no street dedicated across the Louisville and Nashville Railroad Company at those three points now.

38. The map you have before you does not show all the property along Frankfort avenue between Cavewood avenue and Raymond avenue, does it?

A. It does not show any of the property on the southern side.

93 39. Does not show any of the streets on that side of Frankfort avenue?

A. It does not.

40. I believe you spoke of Sycamore street or avenue. Do you know whether that street has ever been dedicated, or not?

A. I do know that it has been dedicated.

41. By whom, and when and how?

A. I don't recall the names of the parties dedicating it; it was by

subdivisions of property in that section, and also by the sales of lots on the street.

42. When was this property, including Sycamore street, or avenue, as you call it, annexed to the city of Louisville?

A. I think it was in the year 1899.

43. Has the general council of the city of Louisville, by ordinance, accepted Sycamore street as a principal public street of this city?

A. I do not know of any formal acceptance of any of the streets by the general council.

44. You merely know what you gather from the records in your office and the county clerk's office?

A. That is all.

45. The records in your office are made under your supervision and directly from the information you gather at the county clerk's office?

A. They are.

46. You would not undertake to say then of your own knowledge that Sycamore avenue or street is a principal public street as provided by law, would you?

A. That depends upon what you mean by "as provided by law." I took it that it was a dedicated street, from all the information
94 that I could gather upon the subject; otherwise I would not have laid it out in the city maps as a dedicated street.

47. In so laying it out on your maps, you were merely acting upon your own opinion in the matter, were you not?

A. No, sir.

48. Upon what did you act?

A. Upon the copies of subdivisions and the sale of lots on the street.

49. Well, from that information you assumed that it was a public street of the city, did you?

A. I did not assume it; I knew it to be.

50. You don't know of any resolution of the general council accepting it?

A. Excuse me; possibly I didn't understand that last question.

Question 49 read to witness.

A. I knew it to be a dedicated street.

51. But you did not and do not know whether it is a principal public street of the city of Louisville and has been accepted as such by the general council by ordinance, do you?

A. I don't know of any acceptation of the street as a public street by the general council of the city of Louisville.

52. What streets, if any, are there south of Frankfort avenue between Cavewood and Raymond?

A. The next street south of Frankfort avenue is Payne street.

53. I mean, street running north and south?

A. Bergemyer and Raymond are streets intersecting Frankfort avenue opposite the property specified, that I know of; I think that Rastetter street also intersects it.

(By Mr. BRUCE:)

54. That is on the south side of Frankfort avenue that you are speaking of?

95 A. Yes; on the south side.

(Mr. FURLONG resumes:)

55. Are those the only streets on that side of Frankfort avenue?

A. They are the only streets that I can recall opposite the property specified on this diagram marked "Exhibit A."

56. Are you familiar enough with the locality to say that the streets on the southerly side of Frankfort avenue between Cavewood avenue and Raymond avenue could be extended northwardly across and into the property on the northerly side of Frankfort avenue without interfering with the streets at present located on the northerly side so as to form regular blocks or squares?

A. Yes; I am sufficiently acquainted to say to that question that they could not be.

57. Would you consider the property between Frankfort avenue and the right of way of the Louisville and Nashville Railroad Company and Clifton avenue and Ewing avenue, as being defined into squares?

A. No; I do not consider it as being defined into squares.

Re-direct examination by Mr. BRUCE:

58. You have been asked by Mr. Furlong whether or not there has been any formal action taken by the general council accepting Sycamore street as a street of the city of Louisville. I will ask you if it is not a fact that it has been very rare for the general council of the city of Louisville to pass resolutions formally accepting streets as public streets in the city of Louisville?

A. Yes; it is rare.

59. Has it not been the custom of the city of Louisville for many years in determining whether or not a block was bounded on all sides by principal streets, to treat as principal streets those

96 which had been dedicated without reference to whether they had been formally accepted by the city, or not?

A. The city has never allowed that question to interfere as to whether the streets were *formerly* accepted or not.

Re-cross-examined by Mr. FURLONG:

60. In speaking about the council accepting streets, you don't mean to include the time since the adoption of the present charter of cities of the first class, do you?

A. I don't mean to include the time previous to the adoption of the charter, because by that instrument they may have all been accepted generally. I have reference chiefly to the streets since the adoption of the present time.

61. Don't you know that it has been the practice, and is a fact, that since the adoption of the present charter in 1893, the general council does accept dedication of streets on the recommendation of the board of public works, and that the law requires that to be done before it is a public street?

A. I know of very few instances where streets were accepted formally by the general council.

62. How many dedications of streets do you know of since the adoption of the present charter of the city of Louisville?

A. I know of a very large number.

63. Will you name some of them?

A. Many of the streets that were included in the annexed suburbs were dedicated.

64. We are speaking now of streets dedicated since 1893.

A. Yes; I say there were a good many streets dedicated since 1893 that are now part of the city of Louisville. Oh!, it would be difficult for me to name them—I could say possibly in that section of the city you speak of, I think Bayless avenue is one recently dedicated.

65. Is that in John S. Cain's subdivision?

97 A. No; that is in the subdivision known as Aubondale. Coral avenue is in the same section. Belleaire street. St. Joseph street Park avenue, I think. I could specify many others if I was in my office so that I could refresh my — from my maps.

66. If I understand you correctly, the street- you have named are streets which have been dedicated since 1893, and about which the general council has taken no action as to accepting or rejecting them?

A. Well, you asked me, if I understood the question, what streets were dedicated since 1893.

67. Well, then, I will ask you if you know whether or not the general council has taken any action regarding the streets which you have mentioned as having been dedicated since 1893?

A. They have not taken any special action on any one of those streets especially. The action that they took by annexation might be considered as accepting them.

68. Do you know where the John S. Cain subdivision is?

A. He has one subdivision west of 18th street.

69. That is the one to which I refer.

A. Yes, I know that subdivision.

70. Don't you know it to be a fact that the general council by ordinance accepted the dedications of all streets in that subdivision?

A. I think they did by special action.

71. Do you know of any other instances of the kind?

A. I can't recall any just now.

72. You have no connection with that branch of the municipal government, have you?

A. I have not.

73. You have no connection with the board of public works whose duty it is to determine what a square is in street assessment
98 matters, have you?

A. I have none.

74. You don't know how they arrive at their assessments, or what property *that* tax, do you, except in a general way, of course?

A. I have nothing to do with it; I am pretty well informed, though, upon the matter in which they usually proceed; but I have no official connection with the department.

STATE OF KENTUCKY, }
Jefferson County, } *ss:*

I, J. K. Avey, a notary public in and for said county and State, certify that the foregoing deposition of D. F. Murphy was taken by agreement, before me, at the time and place, and in the action mentioned in the caption; that said witness was first duly sworn by me that the evidence he would give in said case would be the truth, the whole truth, and nothing but the truth; that said deposition was taken by me in shorthand, and a full and accurate transcript of same made by me; that the reading of said deposition by said witness and his signature to same were waived by counsel; that Mr. William Furlong appeared for plaintiff, Mr. Helm Bruce appearing for defendant.

Witness my hand, this January 30, 1902. My commission expires February 24, 1902.

J. K. AVEY,
N. P. J. C., Ky.

99 STATE OF KENTUCKY, }
County of Jefferson. }

I, John H. Page, clerk of the Jefferson circuit court, do hereby certify that the foregoing *100* pages contain a full, true and complete transcript of the record and proceedings in the action wherein Barber Asphalt Paving Company is plaintiff, and Louisville & Nashville Railroad Company, &c., are defendants, # 29790, as the same appears of record and now on file in my said office.

Witness, John H. Page, clerk of said court, this 21st day of August, 1903.

JOHN H. PAGE,
Clerk Jefferson Circuit Court,
By LEWIS MERRIWETHER,
Deputy Clerk.

Transcript fee, $41.00

100 Upon the foregoing transcript the following statement was made:

Statement of Appeal.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY & CITY OF Louisville, Appellees. } Statement.

The judgments appealed from herein were entered on June 17th, 1902, and June 20th, 1903, and may be found in this record on pages 54 and 72 respectively.

The clerk will issue summons to Jefferson county against the Barber Asphalt Paving Company and the City of Louisville on the appeal herein from the judgment of June 17th, 1902. Appellant desires an appeal granted by the clerk of the court of appeals from that judgment. The appeal from the other judgment (June 20th, 1903) was granted by the court below.

HELM, BRUCE & HELM,
Att'ys for Appellant.

Filed Aug. 24, 1903.

S. J. SHACKELFORD, *C. C. A.*

101 Upon the filing of the foregoing transcript and statement the clerk of said court of appeals granted an appeal as requested in the statement, and issued process, which was returned executed in full.

Afterwards at a court of appeals held in and for the Commonwealth of Kentucky at the capitol in Frankfort, Kentucky, on the 10th day of November, A. D. 1903, the following order was entered herein:

Submission in Ct. of App.

LOUISVILLE & NASHVILLE RAILROAD CO.
v.
BARBER ASPHALT PAV. CO., &c. } Jefferson.

Came the appellees by counsel and moved the court to affirm the judgment herein as a delay case, and the case is submitted on the motion and in chief.

Afterwards, to-wit: on the 19th day of November, A. D. 1903, at a court of appeals held as aforesaid, the following judgment was entered herein, to wit:

Judgment of Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD Company, Appellant, *vs.* BARBER ASPHALT PAVING CO. & CITY of Louisville, Appellees.	Appeal from the 1st. Div. Chancery Branch, Jefferson Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore ordered that said judgment be affirmed, which is ordered to be certified to said court. It is further considered that appellees recover of appellant their cost herein expended.

102 On the same day, the court, through Justice Paynter, delivered the following opinion:

Court of Appeals of Kentucky, November 19th, 1903.

LOUISVILLE & NASHVILLE R. R. Co., Appellant, *vs.* BARBER ASPHALT PAVING CO., &c., Appellees.	Appeal from Jefferson Circuit Court (Ch'y (1st) Div.).

Opinion of the Court by Judge Paynter.

The appellant owns the perpetual right of way over a strip of land, which parallels the street improved under the city ordinance. It is admitted by counsel that the facts of this case raise the question decided in Figg *v.* Louisville & Nashville R. R. Co., 25 R., 350. The opinion in that case reads as follows:

"The main line of the Louisville & Nashville Railroad Company runs southwardly from near Tenth and Broadway streets, Louisville, Kentucky, to and beyond Nashville, Tennessee. Its right of way is sixty feet in width. Under appropriate proceedings in the general council, Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district east of Seventh street and south of Magnolia avenue, is a parcel of land sixty feet wide used by the appellee as a road bed, or what is commonly called the right of way, and as a part of it, a
103 triangular parcel north of Magnolia avenue and east of Seventh street.

It is insisted on the behalf of the railroad company that: (1)The property sought to be subjected to part of the cost of street improvement is only a right of way, and therefore, cannot be charged there-

with; (2) it receives no benefit from the improvement; (3) the right of way is not a lot in the meaning of the statute governing street improvement.

It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use and upon which it builds its road bed, is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. In Elizabethtown, Lexington & Big Sandy R. R. Co. *v.* Combs, 10 Bush, 393, the court held the injury resulting from the location of a railroad in such proximity to adjacent property so that smoke, soot and fire from passing engines was thrown, blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that, the railroad had appropriated it for all time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that, its use of its right of way will be perpetual. It is, therefore, practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be sug-
104 gested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way cannot be charged with the cost of street improvement; while, on the other hand, counsel for the appellant calls attention to cases of other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court in Louisville, Cincinnati & Lexington R. R. Co., and Louisville Railroad Transfer Co. *v.* Obst and Stengel, &c., Mss. opinion, Feb. 23, 1875, City of Ludlow *v.* Cincinnati Southern R. R. Co., 78 Ky., 357, held that such special taxation could be imposed."

On the second question we quote from Preston *v.* Rudd, &c., 84 Ky., 156, which reads as follows:

"Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement; the principle is that the territory is benefited; that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise; but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited.

This rule, however, can not be so extended as to entirely take
from the citizen his property. This would work 'a manifest
105 injustice.' It would be spoilation, and not taxation. Under the guise of benefit and taxation, he can not be thus arbitrarily deprived of his property.

It would be but an appropriation of it, by the exercise of an arbitrary power, to public use without compensation. * * *."

We do not understand that Barfield, &c, *v.* Gleason, &c., 23 R., 128, changes the rule announced in Preston *v.* Rudd, &c., and other cases of this court. Spoilation is not shown in this case.

Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute,

"or the general council, where the territory to be assessed is not bounded by principal streets. The use or non-use or the character of the use to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way, was a lot in the meaning of the statute, and to thus appropriate it cannot change its character."

The judgment is affirmed.

Helm, Bruce & Helm, for appellant.
William Furlong, B. F. Washer, for appellees.

106 Afterwards, on the 17th day of December, A. D. 1903, the appellant by counsel filed in the clerk's office of said court its writ of error (2 copies of which are on file in my office), as follows:

107 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, } *ss:*

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, between The Louisville & Nashville Railroad Company, appellant, against The Barber Asfelt Paving Company & The City of Louisville, appellees a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the* 14th day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of th United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of th United States, the 16th day of December, in the year of our Lor one thousand nine hundred and three, and of the Independence o the United States of America the one hundred and twenty-eigh

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States
for the Western District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed Dec. 17, 1903 by
A. R. BURNAM,
Chief Justice Court Appeals, Ky.

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* Not exceeding 30 days from the day of signing the citation.

[Endorsed:] 1903 Dec'r 17. Filed. Att.: S. J. Shackelford, cl'k.

108 On the same day the appellant by counsel filed in said clerk's office the bond, which was approved by the chief justice of said court, and is as follows:

Bond.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY and CITY OF LOUISville, Appellees.

Know all men by these presents. That we, the Louisville and Nashville Railroad Company and Helm Bruce are held firmly bound unto the Barber Asphalt Paving Company and the City of Louisville in the sum of seven thousand dollars, to be paid to the said The Barber Asphalt Paving Company and the City of Louisville and each of them, and their successors. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this seventeenth (17th) day of December, A. D. 1903.

Whereas, the above named Louisville and Nashville Railroad Company hath prosecuted its writ of error from the Supreme Court of the United States to the court of appeals of Kentucky to reverse

the judgment rendered in the above entitled suit, by the said court of appeals of Kentucky.

Now, therefore, the condition of this obligation is such, that if the above named Louisville and Nashville Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, [L. S.]
By HELM BRUCE, *Att'y.* [L. S.]
HELM BRUCE. [L. S.]

Dec. 17, 1903.

Sealed and delivered in presence of

A. R. BURNAM,
Chief Justice Court of Appeals, Ky.

On the same day the appellant filed in said clerk's office, its assignment of errors and prayer for reversal herein, which is in words and figures following, to-wit:

Assignment of Errors.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD Company, Pl'ff in Error,
vs.
THE BARBER ASPHALT PAVING COMPANY and City of Louisville, Def'ts in Error.
} Assignment of Errors and Prayer for Reversal.

Plaintiff in error, The Louisville & Nashville Railroad Company, assigns the following errors in the judgment of the court of appeals of Kentucky herein, viz:

1st. The court erred in holding that a lot owner may be compelled to pay a part of the cost of improving a street adjacent to such lot, where the part which he is thus compelled to pay is fixed, not by a system of general taxation, but of special assessment, based on pretended special benefits to the property assessed, even though his said property or lot has not in fact been benefited at all by such alleged street improvement; and erred in holding that the property of plaintiff in error described in the pleadings, viz: a section of its railroad right of way, was properly assessable and liable under a system of special assessment based on

pretended special benefits to the property assessed, as prescribed by the statute of Kentucky and ordinances of the city of Louisville herein involved for a part (viz: $3176.72/100) of the cost of improving a street running parallel to said right of way, although said right of way was not benefited, but, on the contrary, was impaired in value, by the improvement of said street; and erred in holding that to subject said section of said right of way to the payment of said part of the cost of said improvement, which part was ascertained, not under a system of general taxation, but of special assessments based on pretended special benefits to the property assessed, did not deprive plaintiff in error of its property without due process of law, nor deprive it of the equal protection of the laws, contrary to the provisions of the Constitution of the United States.

2nd. The court erred in holding that the property of plaintiff in error was liable for any part of the cost of improving the street described in the pleadings under the ordinance therein referred to.

3rd. The court erred in affirming the judgment of the Jefferson circuit court herein.

111 Wherefore plaintiff in error prays that the judgment of the court of appeals of Kentucky herein be reversed and that said court be directed to reverse the judgment of the Jefferson circuit court with directions to dismiss the petition as against this plaintiff in error, The Louisville & Nashville Railroad Company.

HELM, BRUCE & HELM.
Att'ys for Plaintiff in Error.

Afterwards, on the 19th day of December, 1903, the appellant and plaintiff in error filed the following stipulation herein:

Stipulation of Counsel.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY, &c., Appellees.

Stipulation of counsel.

It is hereby agreed between counsel for all parties in the above entitled cause that neither the map which is filed as Exhibit B with the report of the special commissioner William W. Crawford, nor the map filed as Exhibit A with the deposition of the witness D. F. Murphy is material to the consideration of any question to be consid-red by the court on the writ of error from the Supreme Court of the United States to the court of appeals of Kentucky; and that

said maps which are intricate and voluminous may be
112 omitted from the record to be transmitted to the Supreme Court, without prejudice to the rights of any party.

HELM, BRUCE & HELM,
Att'ys for Louisville & Nashville Railroad Company.
BENJAMIN F. WASHER,
Att'y for Barber Asphalt Paving Company.
HENRY L. STONE,
Att'y for the City of Louisville.

113 COMMONWEALTH OF KENTUCKY, } *sct:*
Court of Appeals, }

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the foregoing one hundred and thirteen (113) pages, (a to and including 112) contain a true, full and complete transcript of the record and proceedings had in said court of appeals in the case of Louisville & Nashville Railroad Company, appellant, against The Barber Asphalt Paving Co. and City of Louisville, appellees, except the maps referred to as Exhibits "A" and "B," which are not copied by agreement of parties (see stipulation on page 111); together with the original writ of error (two copies of which remain on file in my office) and copies of the bond and assignment of errors, as the same appears from the records and files of my office. The original citation is also returned with this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Ky., this 28th day of December A. D. 1903.

[Seal Kentucky Court of Appeals.]

SAMUEL J. SHACKELFORD,
Clerk of the Kentucky Court of Appeals,
By ROBERT L. GREENE, *D. C.*

Fee for this transcript $40.00.

Endorsed on cover: File No. 19,192. Kentucky court of appeals. Term No. 541. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* The Barber Asphalt Paving Company & The City of Louisville. Filed January 8", 1904. File No. 19,192.

No. 170.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
NOV 26 1904
JAMES H. McKENNEY,
Clerk.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - Plaintiff in Error,

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - Defendants in Error.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

HELM BRUCE,
For Plaintiff in Error.

JAMES P. HELM,
Of Counsel.

P. C. NUNNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error,*

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - *Defendants in Error.*

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

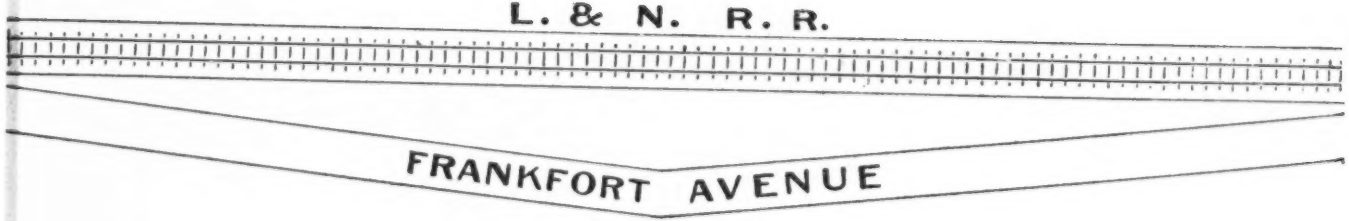
The railroad of the Louisville & Nashville Railroad Company through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said

above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reasons stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in
"the manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.


L. & N. R. R.
FRANKFORT AVENUE

"It says it does now own and for many years has owned "a line of railroad extending from Newport, Ky., to and "through Louisville, Ky., and thence southwardly through "Kentucky and other States.

"It owns, and has long owned, a perpetual right of way "for railroad purposes from Newport to and into Louis- "ville, over a long strip of land, which is about 110 miles "long and about 66 feet wide, on which is constructed its "roadbed, and over which are operated its trains between "and into the cities aforesaid. Occasionally, for short "distances, the width of the right of way as above given "varies, but that given above is the usual width, and is "its greatest width at the place referred to in the petition "herein. The said right of way passes over the parcel of "land described in the petition herein as belonging to this "defendant; in other words, it constitutes a section of "said indivisible and continuous right of way between the "cities aforesaid; and the only interest of defendant in "said land is an easement therein, to wit, the perpetual "right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in the "cities aforesaid, and on the same are laid two tracks, par- "allel with the northerly and southerly lines of said par- "cel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used*

"*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to the* "*slightest degree by the improvement of Frankfort Avenue* "*as set forth in the petition herein. On the contrary, the* "*existence of said avenue and the improvement thereof,* "*which will lead probably to an increase in the use thereof,* "*being very close to the said right of way of defendant,* "*is a positive injury to defendant and its said right of* "*way, rather than a benefit.* Said right of way could be "more safely and advantageously used by defendant for "the only purpose for which it does or can ever use it, if "said Frankfort Avenue were entirely removed from

"within the territory described in plaintiff's petition as a "tax district, than it can with said avenue in said district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defendant "of its property without due process of law, and would "deny to it the equal protection of the laws, contrary to "the provisions of the Fourteenth Amendment to the "Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec., 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it for the cost of this public improvement was "in substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged, and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that

judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error. Defendants in error have now moved to dismiss or affirm.

MOTION TO DISMISS.

We are not advised of the ground upon which the motion to dismiss is made. Not a word is said about it in the brief filed by defendants in error. The answer makes the federal question as plain as the English language can make it; and the motion to dismiss was evidently made merely in order to afford an opportunity for making a motion to affirm; which seems to us to be a manifest abuse of the rule of this court governing such cases.

MOTION TO AFFIRM.

Subsection 5 of Rule 6 of this court says:

> "There may be united with a motion to dismiss a writ "of error or an appeal, a motion to affirm on the ground "that, although the record may show that this court has "jurisdiction, it is manifest the writ or appeal was *taken* "*for delay only*, or that the question on which the juris- "diction depends is *so frivolous as not to need further* "*argument*."

There is certainly nothing in this record to show that this writ was taken for delay only, and we do not see how it can be said under the state of the decisions to which we shall refer, that the federal question involved is "so frivolous as not to need further argument."

I.

Of course, we are familiar with the opinions of this court, first in Norwood vs. Baker, 172 U. S. 269, and then in French vs. Barber Asphalt Paving Company, 181 U. S. 324, and other cases decided on the same day.

The court in the latter cases did not overrule Norwood vs. Baker, nor retract the fundamental principle therein asserted. We do not rely alone upon our own interpretation of the opinions in question. In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court said:

> "In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common "understanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that "there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made "according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-*

"*tical operation do confiscate property*, are obnoxious to "the Fourteenth Amendment to the Constitution of the "United States, and for that reason it is the duty of the "courts to declare them to be void. That special assess- "ments to pay for local improvements of public streets "and highways *do, in practical effect, deprive owners of* "*their property without due process of law, unless the* "*property subject to assessments is benefited by the* "*improvements correspondingly to the amount of the assess-* "*ment.* That owners of property have the right to appeal "to the courts for judicial protection against the uncon- "stitutional invasion of their rights by municipal govern- "ments in enforcing State laws or local regulations for "the collection of assessments *which are in excess of the* "*benefits to the property assessed*, accruing or to accrue "by reason of the improvements to be paid for by such "assessments. *These principles remain unaffected by the* "*recent decisions of the Supreme Court.*" (Pages 33 and 34.)

And speaking of this opinion, the editor of the Central Law Journal says:

"Without hesitation we pronounce this decision not "only eminently just and equitable, but also among the "foremost of the decisions of this question by reason of "its clear recognition and elucidation of right principle "and sound law." (53 Central Law Journal, 281.)

The propositions asserted by the court in White vs. City of Tacoma are exactly those which the plaintiff in error asserts in the case at bar, and upon which it relies for a reversal of the judgment under consideration. And surely it

can not be said that a position taken by one of the federal courts, even though inferior to this tribunal, and which has been so highly commended by one of the leading law journals of the country, is "so frivolous as not to need further argument."

In Norwood vs. Baker this court said:

> "In our judgment, the exaction from the owner of "private property of the cost of a public improvement *in* "*substantial excess of the special benefits* accruing to him "is, *to the extent of such excess*, a taking, under the guise "of taxation, of private property for public use without "compensation. We say 'substantial excess,' because "exact equality of taxation is not always attainable, and "for that reason the excess of cost over special benefits, "unless it be of a material character, ought not to be "regarded by a court of equity when its aid is invoked to "restrain the enforcement of a special assessment." (172 U. S. 279.)

Nowhere in any of the opinions delivered in French vs. Barber Asphalt Paving Company, and other cases decided at the same time, is this principle, so clearly announced in Norwood vs. Baker, retracted; although in the dissenting opinion, concurred in by three of the members of this court, a doubt was expressed as to what was intended by some of the language used in the majority opinion, and a fear that exactly the construction would be placed upon it which the counsel for the defendants in error in the case at bar do now place upon it. In this dissenting opinion Mr. Justice Harlan, speaking for himself and his concurring associates, after referring to the principles announced in Norwood vs. Baker in the language herein above quoted, said:

"Does the court intend in this case to overrule the "principles announced in Norwood vs. Baker? Does it "intend to reject as unsound the doctrine that 'the "principle underlying special assessments to meet the cost "of public improvements is that the property upon which "they are imposed is peculiarly benefited, and therefore "the owners do not, in fact, pay anything in excess of "what they receive by reason of such improvement'? Is "it the purpose of the court, in this case, to overrule the "doctrine that taxation of abutting property to meet the "cost of a public improvement—such taxation being for "an amount in substantial excess of the special benefits "received—'will, *to the extent of such excess*, be a taking "of private property for public use without compensation? "*The opinion of the majority is so worded that I am not "able to answer these questions with absolute confidence.* "It is difficult to tell just how far the court intends to go. "But I am quite sure, from the intimations contained in "the opinion, that it will be cited by some as resting "upon the broad ground that a legislative determination "as to the extent to which land abutting on a public "street may be specially assessed for the cost of paving "such street is conclusive upon the owner, and that he "will not be heard, in a judicial tribunal or elsewhere, to "complain, even if, under the rule prescribed, the cost is "in substantial excess of any special benefits accruing to "his property, or even if such cost equals or exceeds the "value of the property specially taxed." (181 U. S. 352-3.)

Now, in the brief of counsel for defendants in error, the case of French vs. the Barber Asphalt Paving Company is cited in support of *exactly the proposition outlined in the language just quoted.* The answer of the railroad company

pleads that its property is *not benefited at all*, but, in fact, is injured by the making of the improvement on account of which it has been assessed with a charge of $3,176.72; thus showing that the exaction for the cost of this improvement is "in substantial excess of the special benefits accruing" to the property involved. And these allegations are admitted to be true. And yet it is claimed that they are of no effect, that the legislative determination of the matter is conclusive, and that the owner "will not be heard, in a judicial tribunal or elsewhere, to complain, even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property." And it is asserted that any question as to the correctness of such a position, the very question suggested by the dissenting Justices in the opinion just referred to, is "so frivolous as not to need further argument."

We do not know just how far we ought to proceed in the consideration of the merits of the case in a brief upon such a motion as is now before the court. But we recognize, of course, that the entire case of the plaintiff in error is in one sense dependent upon the court's disposition of this motion. If it should sustain it, that is, of course, the end of the case; and, while we can not see how the court, in view of the considerations already suggested, could hold the question here presented to be frivolous, yet we feel impelled to call the court's attention, in a more extended form, to some further suggestions upon the merits of the case.

We have already quoted, from the opinion in Norwood vs. Baker, the deliberate announcement by this court of the essential principle upon which the whole case rests, to wit, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private prop-

erty for public use without compensation." And if that is the law, then, undoubtedly, the answer of plaintiff in error in the case at bar presents a defense, and the judgment in disregard of it should be reversed. The answer pleads, and it is admitted, that the cost in question is in substantial excess of the benefits received, and the Constitution of the United States is relied upon as a protection against a proceeding whereby the property is sought to be taken for the payment of this charge. And if there is any possible ground upon which relief from this assessment can be denied, consistently with the main principle asserted in Norwood vs. Baker, then it is so occult that we have not been able to perceive it.

We have read every line, not only of the many opinions delivered by the court in the several cases decided at the same time with French vs. Barber Asphalt Paving Company, but we have read the statements of facts in all of those cases, as given by the court, and we have not been able to find anywhere any retraction of the essential principle expressed in the words heretofore quoted from Norwood vs. Baker; nor have we been able to find any *condition of facts* presented in any of those cases, so far as is shown by the court's opinions, or its statements of facts, which called for a decision of the question as to whether or not an assessment, which is *in fact in substantial excess of the benefits accruing to the property*, must nevertheless be upheld. In all of those cases the attack was simply upon *the legislative act*, or municipal ordinance, under which the proceeding was had. We have not been able to find the statement, in a single one of the cases, that *as a matter of fact* the cost sought to be assessed upon the property involved was in substantial excess of the benefit accruing to it. If any such fact appeared in any record then before the court, that fact is not stated in any statement of

fact or opinion of the court then made or delivered; and surely nothing which the court decided was in view of any such consideration. In the first and leading case of the series, to wit, French vs. Barber Asphalt Paving Company, the court, after referring to Norwood vs. Baker and to the principle thereby established, and without to any extent retracting the same, says:

"It may be conceded that courts of equity are always "open to afford a remedy where there is an attempt, "under the guise of legal proceedings, to deprive a person "of his life, liberty or property without due process of law. "And such, in the opinion of a majority of the judges of "this court, was the nature and effect of the proceedings "in the case of Norwood vs. Baker.

"*But there is no such state of facts in the present case.* "Those facts are thus stated by the court of Missouri:

"'The work done consisted of paving with asphaltum "the roadway of Forest Avenue in Kansas City, thirty- "six feet in width, from Independence Avenue to Twelfth "Street, a distance of one-half a mile. Forest Avenue is "one of the oldest and best improved residence streets in "the city, and all of the lots abutting thereon, front the "street and extend back therefrom uniformly to the depth "of an ordinary city lot to an alley. The lots are all "improved and used for residence purposes, and all of "the lots are substantially on the grade of the street as "improved, and are similarly situated with respect to the "asphalt pavement. The structure of the pavement along "its entire extent is uniform in distance and quality. "There is no showing that there is any difference in the "value of any of the lots abutting on the improvement.'" (181 U. S. 345.)

This is the statement of facts upon which the case was decided, from which it is seen that there is an entire absence of any showing that the cost of the improvement was in substantial excess of the benefits accruing therefrom. Not a word is said on that subject. But the proposition upon which the property owner there resisted the assessment was, that the act and ordinance under which the assessment was made were unconstitutional, because no provision was made for a hearing upon the question of benefits. He did not insist as a matter of fact that there was no benefit, or that the cost was in excess of the benefit, but he simply said, I have had no hearing on that question, and no opportunity for a hearing, and therefore the entire procedure is void. And it was that proposition, and only that proposition, which the court denied in French vs. Barber Asphalt Paving Company, and other cases decided at the same time.

The fundamental principle announced in Norwood vs. Baker, in the language heretofore quoted, was the deliberate decision of this, the highest judicial tribunal in the land, and is the law of the land, unless it has been retracted by the court in the subsequent cases mentioned; and that this has not been done, we think we have made manifest from what we have said. And if this be true, the judgment involved in the case at bar must be reversed.

It is said in the brief for defendants in error that this court, in the case of Walston vs. Nevin, 128 U. S. 578, upheld the validity of the statutes of Kentucky governing special assessments. But an examination of the opinion in that case will immediately show that the court's attention, as in the case of French vs. Barber Asphalt Paving Company, was directed entirely to the *validity of the statute.* The question as to whether or not the enforcement of an assessment in *substantial excess of the benefit* conferred by the improvement would

be the deprivation of property without due process of law was neither considered nor decided. And the court upheld *the statute* on account of a provision in it to the effect that "the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned" (Section 2834 of Kentucky Statutes, quoted in the appendix to the brief for defendants in error); under which statute the Court of Appeals of Kentucky had previously said that the powers vested in the local government were subject to the supervision of the courts "where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation." This court, for the reasons suggested, held that the statute was not unconstitutional. But in the case at bar, notwithstanding the provision of the statute just mentioned, the court declined to accept as a defense the admitted fact, pleaded in the answer, that the property of defendant was only a railroad right of way, and that it was not benefited to any extent whatever, but was, rather, injured in value, by the improvement in question, thus showing that the cost sought to be imposed upon that property, to wit, $3,176.72, was in substantial excess of the benefits accruing from the improvement. The court sustained a demurrer to that answer, thus holding that these facts constituted no defense to the assessment, and entered a judgment, notwithstanding these admitted facts, enforcing a lien upon the property for the amount named. And it matters not to the defendant (plaintiff in error), nor does it make any difference in point of law, whether the fault in taking defendant's property without due process of law lies with a *legislature* or a *court;* for the probibitions of the Fourteenth Amendment to the Federal Constitution, against depriving any person of

his property without due process of law, are not leveled only against the legislative department of the State, but run against the judicial and executive departments, as well as against the legislative. (Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226, 233.) Therefore, if "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," it matters not to the owner of such property whether this result is accomplished because the statute, when *properly* construed, attempts to authorize or require it, or because the court which actually enforces the statute holds that, under the statute, the property owner can not be heard to say that the cost assessed against him is in substantial excess of the benefits accruing to him.

The court held that "the question of benefits is *determined by the legislature*, and can not be raised, as is attempted to be done in this case, by the Louisville & Nashville Railroad Company, in the second paragraph of its answer. Being a matter for the legislature to determine, the courts will not interfere except in cases of spoliation." (Rec., 28.) And the court further held that by spoliation is meant "to *entirely* take from the citizen his property," saying on this subject:

> "It follows that a lot owner may be compelled to pay "his proportion of the cost of an improvement, *although* "*in his particular case the property may not be benefited.* "This rule, however, can not be so extended as to *entirely* "take from the citizen his property. This would work a "manifest injustice. It would be spoliation, and not tax- "ation." (Rec., 29.)

In other words, the court held that, although the property of defendant might not be benefited at all by an improvement for which his property was assessed with a large sum, and although that sum might equal *one-half* or *three-fourths* of the value of defendant's property, yet this would constitute no defense to the assessment and afford no ground for relief to the owner of the property; that the court could not, and would not, act unless it could be shown that the cost of the improvement was *equal* to the value of the property, so that the proceeding could be said "to *entirely* take from the citizen his property." And, accordingly, the court held in this case that the assessment of $3,176.72 against about one-third of a mile of a right of way, which is at the rate of nearly *$10,000 a mile*, and where the improvement was of *no benefit whatever*, but rather a disadvantage to the right of way, was perfectly legitimate. In other words, says the State Court, it is clearly *constitutional* to take *half* of the citizen's property without compensation, but flagrantly *unconstitutional* to take *all of it.* But *this* court has said it is unconstitutional to take any sum in "substantial excess" of the benefits conferred.

An example of the effect which the court in the case at bar gave to the provision of the statute authorizing the court to "make all corrections, rules and orders to do justice to all parties concerned," is afforded by a correction which the court did make in the *manner of apportioning* the cost upon the various properties which the statute charges therewith. It will be seen from the provisions of the statute (quoted in the appendix to the brief of defendant in error), that where the territory contiguous to the street improvement is *divided into squares* by being bounded by principal streets, the assessment is by the statute peremptorily required to be upon each "fourth of a square" abutting upon the street improvement; thus making two quarter squares on each side of the improvement, the

effect of which, therefore, is, of course, to go back on each side halfway to the next parallel street. But when the territory contiguous to the improvement is *not defined into squares* by principal streets, then the statute requires that the ordinance providing for the improvement shall state the depth on both sides of the improvement to be assessed for the cost of making it. Thus it is apparent, and the courts of Kentucky have so held, that, where the contiguous property is defined into squares, the statute itself fixes the district to be assessed, leaving the council nothing to do in the matter; but where it is not thus defined into squares, then the council must fix the line on each side of the improvement to which the assessment shall go. Cooper vs. Nevin, 90 Ky. 85; Preston vs. Roberts, 12 Bush, 570. But, in either event, when the outer boundaries of the territory to be assessed have been fixed, whether by the statute or the ordinance, *all property within those boundaries* must be "equally" assessed according to the number of square feet in each piece of property. And in the case at bar the City Council, in providing for this improvement of Frankfort Avenue, treated the territory adjacent thereto as *not* being defined into squares, and therefore undertook to state that the assessment should be on each side of the improvement to a line 195 feet therefrom; and the petition alleged that the territory was not defined into squares. But as the amended answer of the defendant alleged that this territory was divided into squares (Rec., 32), and as the evidence so showed, the court accordingly ordered a correction of the assessment so as to conform to the requirement of the statute in such cases, in the manner of making the apportionment, by extending to a line halfway to the next parallel street; the effect of which was to reduce the assessment upon the right of way of defendant by the sum of $296.22, thus reducing it from $3,472.94 to $3,176.72.

Thus, while the court assumed to *correct the manner of apportionment* of the cost, in order to conform to the language of the statute, yet it held that it was not permissible for defendant to allege and show as a matter of fact that its property was not benefited at all, and that the cost of the improvement, which was a substantial sum, was, therefore, in substantial excess of the benefits accruing to the property of defendant.

II.

Thus far we have been considering the principle under discussion, in its application to all kinds of property. But whatever may be the true rule as to property in general, the property involved in the case at bar is peculiar; it belongs to a class by itself; it is *a railroad right of way.* It is one kind of property which certainly is not benefited, and can not be benefited, by the improvement of a highway running either across it or parallel to it. The question is not as to whether the railroad company which owns this section of a right of way is benefited by the construction or improvement of streets running into or through the city; for all the inhabitants of the city, all persons who do business in the city, the railroad company included, are benefited by anything which benefits the city, and increases its commerce. But while such general benefits justify general taxation, they do not justify special taxation, assessed upon specific pieces of property, selected out of the great bulk of the property in the city. The benefits which justify special assessments, for the purpose of paying for local improvements, must be benefits special or peculiar to *the property which is specially taxed.* Therefore we say that, while the construction or improvement of a highway which runs across or parallel with a portion of a railroad right of

way may benefit the railroad *company*, just as it benefits all other inhabitants of the city, yet it does not benefit that *particular section of the right of way*, which happens to be near the street thus improved.

We are not now considering the question of whether the construction or improvement of the street benefits property upon which the company's *depot* may be situated, or property occupied by its *yards*, but we are considering alone the question of benefit to a mere section of its *right of way*, which is occupied solely by a portion of the roadbed of its main road, and the tracks thereon. And the peculiar nature of this property, and the peculiar use made of it, make it so absolutely plain that no benefit thereto can come from the improvement of an adjacent highway, over which persons travel in carriages or on foot, as to make the proposition indisputable, and one which a court, or the judge thereof, as a man of common knowledge and experience, must know to be true, even in the absence of allegation or proof.

In the case at bar it is alleged, and not denied, that on this narrow right of way, which is only 66 feet wide, the portion thereof involved in this case being nearly 1,800 feet long, there are no houses or buildings of any kind; that there is a double track railroad upon it; and, in the language of the answer, "it is used only, and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its roadbed, as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid." (Rec., 16.) And the great weight of modern authority, even before the case of Norwood vs. Baker was decided, was and is to the effect that property of this kind can not be assessed with any part of the cost of improving a street, *because it is one class of property concerning which it is not possible to indulge the presumption that it is benefited by such an improvement.*

One of the strongest cases on this subject is Allegheny City vs. West Pennsylvania Railroad Co., 138 Pa. St. 375. This is a peculiarly strong case, because the general rule in Pennsylvania, as recognized in that case, is, that the owner of an ordinary piece of property can not defend against a local assessment on the idea that his property is not benefited. The opinion in this case is so strong and so directly applicable to the case at bar, and has been so often cited and quoted since, that we feel justified in making quite an extensive quotation from the language of the court. It says:

"The constitutionality of assessments for street improvements can be sustained only upon the ground that the property assessed is benefited by the improvement. This is the doctrine of all the authorities. It is sufficient to refer to Hammett vs. City of Philadelphia, 65 Pa. St. 150.

"It is true, as a general rule, the property owner can not defend that his property is not benefited by the improvement. Michener vs. City of Philadelphia, 118 Pa. St. 535; Commonwealth vs. Woods, 44 Pa. St. 113. These cases, however, and the reasoning by which they are supported, have no application to the roadbed of a railroad company. *This is the one species of property which, it is conceded, can derive no possible benefit from street improvements.* As was said in Philadelphia vs. Railroad Company, *supra* (88 Pa. St. 424), 'a railroad can not, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood *may*.' The owner of an ordinary lot of ground, whether such owner be an individual or a railroad corporation, can not be heard to defend against a municipal assessment for paving, for the reason that the *law presumes* such property is benefited. But, in the case of the roadbed

"of a railroad, the presumption of law is the other way. "It is the same at all times and under all circumstances; "herein *the law declares the absence of benefits.*

"It was urged, however, that the liability of a rail- "road company for municipal assessments was decided by "this court in Western Pennsylvania R. Co. vs. Allegheny, "2 W. N. 229. That case does not rule this, however. "A railroad company may be liable for some municipal "assessments. We have just decided in Mt. Pleasant Bor. "vs. Railroad Co. (138 Pa. St. 365), as has been already "stated, that a passenger depot, freight depot, and lumber "yard were so liable. But neither of the above cases "nor any other case to which my attention has been called "has ever held that such a lien may be filed against the "roadbed. It was urged, however, that it is *within the* "*power* of the legislature to subject it to such claims, "and that the act of 1870 has done so in the city of "Allegheny. We are not discussing the power of that "body to impose *general taxation.* It is admittedly very "great, and as observed in Fox's Appeal, 112 Pa. St. 337, "'within the limits of the Constitution it is bounded only "by the necessities of the State and the will of the peo- "ple.' We are dealing with the case of *special, local* "taxation; of the right of municipal authorities to levy "a tax upon A, which it does not impose upon B, for the "reason that it has done something by which the property "of A has been specially benefited to the amount of the "tax. In the absence of any such benefit, in a case "where we can declare as a matter of law no such bene- "fit can arise, the legislature is powerless to impose such "a burden. It would not be a tax in any proper sense of "the term; it would be in the nature of a forced loan, "and *would practically amount to confiscation.*" (Pages 382 and 383.)

The same conclusion was reached by the Supreme Court of Wisconsin in Chicago, M. & St. P. R. Co. vs. Milwaukee, 89 Wis. 506. Here the court follows the reasoning and cites a number of the decisions of the Supreme Court of Pennsylvania, including the one just quoted from, and, among other things, says:

"It is universally conceded that all such assessments "(special assessments) have their foundation, rest upon, "and can not lawfully exceed, the special benefits of the "improvement to the property against which the cost of "its construction to that extent is charged. (Citing author- "ity.) Such an assessment can not be maintained for "general benefits to the community or locality resulting "from the work. For the payment of such expenditures, "resort must be had to *general* taxation, the rule of which "is required to be uniform. * * * We think it "clear, *as a matter of law*, that property such as the rail- "road tracks and necessary right of way can not be said "to be benefited by the improvement in question. "* * * In Junction R. Co. vs. Philadelphia, 88 "Pa. St. 424, it was held that the city could not maintain "a municipal claim for paving against or opposite the "roadbed of a railroad company, and that it was *imma- "terial whether the company had simply a right of way "or owned the bed in fee.* * * *

"It was contended that the assessment of the Board "of Public Works is conclusive that the entire strip in "question, *including the track and necessary right of way*, "was benefited by grading and paving of Commerce "Street; and that the only question open to the appellant "was as to the amount of benefits. (Citing the cases "relied on.) The question of benefits to the track and

"right of way being a legal one, manifestly the assess-
"ment can not be conclusive, but the position is no doubt
"correct as to the rest of the strip. This precise question
"was presented in Allegheny City vs. West. Pennsylvania
"Railroad Co., 138 Pa. State, 382, where it was held that,"
etc. (Quoting part of the language hereinbefore
quoted in this brief.) Pages 515, 516 and 517.

In Detroit, etc., R. Co. vs. City of Grand Rapids, 106 Mich. 13, which involved a local assessment upon the railroad right of way, the court said:

"The right of way so assessed contains the main track
"and one sidetrack. It has nothing else upon it, and is
"used for no other purpose. It has already been dedi-
"cated to a public use, and the question is presented
"whether a railroad right of way can be assessed by
"municipal corporations for public improvements. So
"far from being any benefit, it is established by the evi-
"dence that the opening and paving of the street were a
"damage to the complainant. *A right of way can not be*
"*benefited by the opening and paving of a street upon it.*
"None of the buildings of the complainant are within
"two blocks of this crossing. We can see no benefits,
"immediate or prospective, to the complainant. The
"division of the right of way into three parcels was
"*arbitrary, as were also the valuations and supposed ben-*
"*efits.* The point is so clearly and concisely stated by
"the Supreme Court of Pennsylvania that we quote the
"opinion in City of Philadelphia vs. Railroad Co., 33 Pa.
"St. 43." (Here quoting.)

In New Jersey R. R. Co. vs. City of Elizabeth, 37 N. J. Law, 330, there were involved two assessments against a railroad right of way, one for improving a street which crossed

it, and the other for improving a sewer near it. The court held that there was no benefit from either improvement, and hence that the assessments could not be upheld. On the subject of the street improvement it said:

"Nor can this assessment be supported on the other "ground of benefits conferred in the advantage derived "in the improvement of the company's lands for the uses "to which they are appropriated. The proof is that the "paving laid on the crossing of the street over the rail- "road track is an injury, rather than a benefit, to the "company, and occasions increased expenses in keeping "the track in repair. The case in this respect is within "the decision of this court in State, the M. & E. R. R. "Co. Pros. vs. Jersey City, 7 Vroom. 56; and the assess- "ments for paving must be set aside." (P. 333.)

Then, as to the sewer assessment, the court said:

"There is nothing in the purpose for which the com- "pany was incorporated, or the use to which the land was "appropriated, that will invalidate the assessment; it "must, therefore, be affirmed, unless its imposition, in "this case, is a violation of the principles laid down in "the Tidewater case (3 C. E. Green 519), that an assess- "ment of an individual owner towards defraying the cost "of a local improvement, must be founded on some pecu- "liar benefit derived by him from its construction over and "above that of the public, and that the amount which he "may lawfully be required to contribute to that end, is "limited to the quantum of benefit he receives." (P. 333.)

Again, in the same volume is reported the case of State vs. Mayor, etc., of Newark (37 N. J. Law, 415), in which the court, through Chief Justice Beasley, said:

"In a government in which the legislative power is not "omnipotent, and in which it is a fundamental axiom "that private property can not be taken without just "compensation, the existence of an *unlimited right* in "the lawmaking power to concentrate the burden of a "tax upon specified property *does not exist.* If the "statute should direct a certain street in a city to be "paved, and the expense of such paving to be assessed "on the houses standing at the four corners of such "street, this would not be an act of taxation, and it is "presumed that no one would assert it to be such. If "this can not be maintained, then it follows that it is "conceded that the legislative power in question is not "*completely arbitrary.* It has its limit; and the only "inquiry is, where that limit is to be placed.

"This question was considered, and, as it was supposed, "was definitely settled by this court in the case of the "Tidewater Co. vs. Coster, reported in 3 C. E. Green 519. "The principle sanctioned by that decision was, that the "cost of a public improvement might be imposed on par-"ticularized property to the extent to which such prop-"erty was exceptionally benefited; and that *any special* "*burthen beyond that measure was illegal.* It was upon "this principle that the case was rested. The rule thus "adopted stands upon the idea that it establishes a stand-"ard by which, with at least an approach to precision, "an act of taxation may be distinguished from an act of "confiscation." (P. 421.)

The opinion of the Supreme Court of Iowa in Chicago, etc., Ry. Co. vs. City of Ottumwa, 112 Iowa, 300, is quite pertinent to the present consideration, though possibly it can not be cited as an absolute adjudication of the question, for

the case was really decided upon a question of construction of the statute, although, as will be seen from the opinion, this construction was induced mainly by the consideration that a *railroad right of way is not benefited* by the paving of a street, and therefore could not be assumed to have been within the legislative intent in providing for local assessment to pay for the cost of such improvement. The court says:

"We may well assume that the legislature, in passing "the acts in question, did not intend that railway rights of "way should be assessed for paving and curbing, for the "reason that such rights, used solely for the laying of "tracks, would not, as a general rule, be benefited in any "manner whatever by the paving or curbing, and if any "argument were needed to enforce this thought, it is to "found in the facts of this case, which show that it was "of no benefit whatever to the right of way. A differ- "ent question arises where the property is used for depot "grounds and other like purposes. On that point we "express no opinion, for it does not arise in the instant "case. (Page 310.) * * *

"Again, it is said that no benefits resulted to the right "of way, or to the corporation owning or occupying the "same, and that for this reason the assessment was *invalid.* "If that were the only question in the case, *we would be* "*inclined to hold with appellant's contention that, as there* "*was no benefit whatsoever, the assessment was, for that* "*reason alone, invalid.* There are, of course, some objec- "tions to this conclusion, and it is best perhaps that we "express no decided conviction on the subject, for it seems "to be held by courts of high authority that the legis- "lature has power to authorize the assessment of railway

"rights of way for local improvements. *In re* County "Commissioner of Hampshire County, 143 Mass. 424. "That question is also left open for further consideration "when it properly arises." (P. 313.)

An examination of the Massachusetts case here referred to by the Supreme Court of Iowa shows that the improvement involved in the Massachusetts case was not a street improvement, but was the improvement of a bank of the Connecticut River near which ran the right of way of the railroad, so that the protection of the bank of the river operated as a protection, and consequent benefit, to the railroad right of way. In fact that does not seem to have been disputed in the case, and there was no question of constitutional power involved in it.

On the question of fact as to whether or not railroad property is benefited by the improvement of a street near it, the Supreme Court of Connecticut seems to have gone to an extreme length in the case of New York, etc., R. Co. vs. City of New Haven, 42 Conn. 279, in which it was held that there is no special benefit even to the *depot property* of a railroad company by the improvement of a street approaching the same. But it is not necessary for the purposes of the present case that the correctness of this conclusion should be determined.

III.

Now, as against this array of authorities, most of which are quite modern, counsel for the defendant in error rely upon two cases, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, and Peru, etc., R. Co. vs. Hanna, 68 Ind. 567.

In the first of these two cases, to wit, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, in dealing with this

question of the right to assess the railroad right of way for the improvement of a street, the court says:

"But it is said that assessments, as distinguished from "general taxation, rest solely upon the idea of equivalents, "a compensation proportioned to the special benefits "derived from the improvement, and that in the case at "bar the railroad company is not, and in the nature of "things can not be, in any degree benefited by the "improvement. It is quite true that the right to impose "such special taxes is based upon a *presumed* equivalent; "but it by no means follows that there must be *in fact* "such full equivalent in every instance, or that its "absence will render the assessment invalid. * * * "*The mode adopted by the council becomes the statutory* "*equivalent for the benefits conferred, although in fact the* "*burthen imposed may greatly preponderate.* In such "case, if no fraud intervene, and the assessment does not "substantially exhaust the owner's interest in the land, "his remedy would seem to be to procure, by a timely "appeal to the city authorities, a reduction of the special "assessment and its imposition, in whole or in part, upon "the public at large." (P. 165.)

As to the last suggestion, that a party's remedy is to appeal to the city authorities to reduce his assessment and impose the burden upon the public at large, this can not apply to an assessment made under the law of Kentucky, for no such appeal would be, or could be, heard under the Kentucky law. The council has no discretion in the matter.

The language of the Supreme Court of Ohio in the case just quoted seems to us to be in effect the language of absolutism. To the citizen who insists that his property can not

be taken without compensation, and that the particular improvement in question is of no benefit to him, and therefore no compensation for the burden imposed, and that there is no reason why his property should be singled out from the mass of property in the city and required to pay the cost of this public improvement, and that the Constitution gives him a right to an equivalent for his property taken, the court says: "Yes, you are right about this; you are entitled to compensation; the legislature can not take your property, even for public use, without an equivalent to you; the Constitution so provides; *BUT* that is a mere *fiction* of the law; although *in fact* you received no equivalent, yet the law conclusively *presumes* you have received it, because the legislature and council have ordered your property to be taken; and '*the mode adopted by the council becomes the statutory equivalent for the benefits conferred.*'" This process of reasoning seems to us to make the claim of constitutional limitation upon the power of the legislature, and of constitutional protection to the rights of private property, a subject of ridicule. The most absolute despot that ever lived might, with equal force and truth, boast that his is a constitutional monarchy, while saying to a subject: "I want your house and lands; you are entitled to be paid for them; an order has been issued that you deliver them to me; that order is the 'equivalent' for your property. You are *presumed* to have been compensated."

In the other case relied on, to wit, Peru, etc., R. Co. vs. Hanna, 68 Ind. 567, the court, without attempting to reason upon the subject, disposes of it in the following two short sentences, to wit:

"The first point made by appellant's counsel is that the "strip of ground in controversy is not assessable for street "improvement, because the railroad track is itself a public

"highway. We can not concur in this view, but are of "opinion that the track of a railroad company, when it "borders on a street, is properly assessable for its due pro- "portion of the cost of the improvement of such street "under an ordinance of the city. City of Chicago vs. "Baer, 41 Ill. 306; Northern Indiana R. R. Co. vs. Con- "nelly, 10 Ohio St. 159; Burlington, etc., R. Co. vs. "Spearman, 12 Iowa, 112." (P. 567.)

Now, of the three authorities thus cited by the Supreme Court of Indiana in support of this proposition, two of them, to wit, the cases in 41 Illinois and 12 Iowa, have absolutely no application to the question under consideration, because in each of them it was conceded that the property in question *was benefited* by the improvement made. In the Iowa case the property was a railroad *depot*; and while the Supreme Court of Iowa held that this was assessable, we know from the authority heretofore cited that, as to a railroad *right of way*, the Supreme Court of Iowa holds that it is not benefited by a street improvement, and is not assessable. (Chicago, etc., R. Co. vs. City of Ottumwa, 112 Iowa, 300, 309.) And in the Illinois case, City of Chicago vs. Baer, 41 Ill. 306, the property involved was a street railway, in the street improved, and the court in its opinion expressly says that no one denies that the property is in fact benefited, that the fact of actual benefit to the property is something which *no one would controvert.* The only other authority cited by the Indiana court for its very brief statement on the subject is the case, just considered, of Northern Indiana R. Co. vs. Connelly, 10 Ohio St. 159.

We find that a decision by this court, to wit, Illinois Central Railroad Co. vs. City of Decatur, 147 U. S. 190, is sometimes cited as a decision to the effect that a railroad right of

way is benefited by the improvement of a street, and that to assess the right of way with that part of the cost of such improvement does not deprive the company of its property without due process of law. As a matter of fact, however, no such question was involved in that case. The case was one which arose in a State court in Illinois and came to this court by writ of error to the Supreme Court of Illinois. Of course, it came here only on *a federal question*, and only upon such federal question as was *raised by the record*. And the only federal question raised by the record was a question of *contract*. The railroad company in its charter had a provision to the effect that, upon the payment of certain taxes, it should be exempt from *all other taxation*; and it was insisted that this exemption covered *special assessments* for local improvements, as being a form of taxation; and therefore, that the attempt to tax the property of the railroad company for a street improvement was a *violation of the charter contract*. The railroad company did not make the question that to tax the property for a local improvement, when there was no local benefit, was a deprivation of property *without due process of law*. That the question in the case was the one we have stated, to wit, the question of contract, and not a question of due process of law, is shown by the opening sentence in Mr. Justice Brewer's opinion, which is as follows, to wit:

> "*The single question in this case is*, whether this special "tax for the local improvement *is within the exemption* "*from taxation granted to the railroad company by Sec-* "*tion 22 of the act of 1851*." (P. 197.)

The court then proceeds to examine into the question of the nature of general taxation and special taxation, and to show that, while a special tax is, in its proper sense, *a tax*,

yet it was manifestly not the character of tax that was referred to by the terms used in the charter contract, and therefore, that there was no violation of that contract. And when the court, in the last paragraph of its opinion (p. 208), uses language to the effect that the company did not, by its charter, have any contract as to whether the question of local benefits should be determined by a *jury* or by a *council*, it was still considering the question of the *construction of that charter contract*, and was referring to the fact, which is a fact in Illinois judicial history (as shown by the opinion of the court in White vs. the People, 94 Ill. 504), that there had grown up in the State of Illinois two different procedures for paying the cost of local improvements, to wit, one called generally a "special tax," and the other a "special assessment," in one of which *the council* passed on the question of benefits, and in the other of which *a jury* passed on the question. And all the court meant by the language of the last paragraph of the opinion is that the railroad company had no *contract* with the State of Illinois as to how the question of special benefits should be determined. The question involved in the case at bar as to the power to impose a special tax upon property for a local improvement, based on the pretense of local benefit, when there had, in fact, been no local benefit, was not involved in that case, as the opening sentence of the opinion above quoted shows.

The court may find a number of *Street Railway* cases cited, in which it has been held that a street railway, *lying in the street improved*, may be assessed for an improvement of the street. But it is manifest that an improvement of the street in which the street railway lies is a benefit to the street railway; and in the cases upon that subject this consideration is brought forth. Thus City of New Haven vs. Fair Haven R. Co., 38 Conn. 422, is sometimes cited; but

that was a case of a *street railway*, and the court said, as a matter of fact, that the defendant was *unquestionably benefited* by the improvement. Again, the case of the Appeal of North Beach R'y Co., 32 Cal. 499, is sometimes cited. This also was a street railway; and the court held as a *conclusion of fact* that there could be no doubt that the property of the street railway company was benefited by the widening and improvement of the street involved. On that subject it said: "The more people traveling and frequenting Kearney Street, the greater the number likely to ride in the company's cars, and the greater its profits are likely to be." (32 Cal. 514.) Manifestly, these street railway cases have no bearing whatever upon the question involved in the case at bar.

It seems to us it must be evident to any thinking person, and would be evident in the absence of allegation or proof, that a *mere section of the right of way of a railroad*, whether the title be technically an easement or a fee, upon which are only the roadbed and the tracks of the company, is *not benefited to the slightest degree by the opening or the paving of a street, crossing the same or running parallel with it;* but that, on the contrary, as alleged in the answer in the case at bar, the improvement of such a street, or anything which induces additional passage over it, running across the railroad or immediately adjacent to it, is an injury rather than a benefit. And it seems to us to be simply a mockery to say that, while this is true, yet the court will *presume the contrary to be true*, in order to meet the constitutional requirement that the property of the citizen shall not be taken, even for a public purpose, without just compensation. And we do not believe that this court has ever retracted, and we certainly hope that it never will retract, the proposition so strongly and clearly stated in Norwood vs. Baker that "the exaction from the owner of private property of the cost

of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

IV

After the enunciation by this court of the principle involved in Norwood vs. Baker, it was received by the Supreme Courts of many of the States with, we might almost say, enthusiastic approval, as being manifestly and eminently just.

In Sears vs. Board of Aldermen of Boston, 173 Mass. 71, the Supreme Court of Massachusetts said:

> "It is now established by the highest judicial authority "that such assessments (special assessments) can not be "so laid upon any estate as to be in substantial excess of "the benefit received. The case of Norwood vs. Baker, "172 U. S. 269, contains an elaborate discussion of the "subject, with a citation of authorities from many of the "States, and holds that a local assessment for an amount "in substantial excess of the benefit received is in violation "of the Fourteenth Amendment of the Constitution of "the United States, inasmuch as it would deprive one of "his property without compensation, and so without due "process of law. The authority of this case is controlling "in all State courts, and *if it were not*, it is *in accordance* "*with sound principle*, and with the great weight of author- "ity in other courts." (P. 78.)

In Hutchison vs. Storrie, 92 Texas, 685, the Supreme Court of Texas, after stating the principle decided in Norwood vs. Baker, says:

"We recognize the binding force of the decisions of "the Supreme Court of the United States upon this ques- "tion, but *we the more readily apply it, because we endorse* "*it as a timely and just announcement of the superiority* "*of a constitutional guaranty over a rule of law established* "*by the courts.*" (P. 691.)

The Supreme Court of Ohio in Schroder vs. Overman, 61 Ohio St. 1, 47 L. R. A. 156, fully recognized the effect and the justice of the principle settled by Norwood vs. Baker, but pointed out that in that case the court had determined, upon the trial, that the benefit in fact exceeded the amount of the assessment; and in that connection said:

"Undoubtedly, as has been held by this court again and "again, the principle which permits the assessments of "the cost of local improvements upon abutting and con- "tiguous lands, is, that such property receives benefits "beyond that common to the public at large, and the *con-* "*clusion would naturally follow*, and does follow, that *such* "*assessment can in no case, save by express consent of the* "*owner, lawfully exceed such benefit.* It follows, further, "that any system which results in imposing such assess- "ments without respect to benefits must be vicious and "unsound. But we are dealing with a case where the "court has determined, upon a trial, that the benefit *in* "*fact* exceeds the amount of the assessment, and yet where "the plaintiff asks the interposition of a court of equity to "prevent the commission of an alleged wrong upon her "property." (P. 13.)

In Kersten vs. City of Milwaukee, 106 Wis. 200; 48 L. R. A. 851, a board of public works claimed to have viewed the premises, and to have based an assessment upon their

judgment of cost and benefit; but the court disregarded the same upon the proof in the case to the effect that the conclusion of the board was *palpably not justified by the facts*, and on that subject the court said:

> "It is not enough for the board to say that they viewed "the premises, and exercised their judgment, if the facts "negative that assertion. Here *the facts cry out so loudly* "*against the conclusion reached that we find no difficulty* "*in agreeing with the court's estimate of the board's pro-* "*cedure.*" (P. 204.)

Accordingly the court held that all proceedings should be stayed until there should be a reassessment of damages and benefits.

We think we may appropriately conclude our reference to authorities by a quotation of the language of Judge Dillon in his work on municipal corporations, in which, in speaking of this subject and the conflict in authority, he says:

> "Whether it is competent for the legislature to declare "that no part of the expense of a local improvement of a "public nature shall be borne by a general tax, and that "the whole of it shall be assessed upon the abutting prop- "erty and other property in the vicinity of the improve- "ments, thus for itself conclusively determining, not only "that such property is specially benefited, but that it is "thus benefited to the extent of the cost of the improve- "ment, and then to provide for the apportionment of the "amount by an estimate to be made by designated boards "or officers, or by frontage or superficial area, is a question "upon which the courts are not agreed. Almost all of "the earlier cases asserted that the legislative discretion "in the apportionment of public burdens extended thus

"far, and such legislation is still upheld in most of the "States. But since the period when express provisions "have been made in many of the State Constitutions "requiring uniformity and equality of taxation, several "courts of great respectability, either by force of this "requirement or in the spirit of it, and perceiving that "special benefits actually received by each parcel of con- "tributing property *was the only principle upon which such* "*assessments can justly rest*, and that any other rule is "unequal, oppressive and arbitrary, have denied the "unlimited scope of legislative discretion and power, and "asserted *what must, upon principle, be regarded as the* "*just and reasonable doctrine, that the cost of a local* "*improvement can be assessed upon particular property* "*only to the extent that it is specially and peculiarly bene-* "*fited; and, since the excess beyond that is a benefit to the* "*municipality at large, it must be borne by the general* "*treasury.*" (2 Dillon on Municipal Corporation, 4th edition, page 935, Section 761.)

It seems to us that the edict of the legislature, to the effect that the cost of improving a public street shall be assessed solely upon the property, and all the property, lying between that street and a parallel line drawn halfway between it and the next parallel street, regardless of the nature of the property lying within such territory, although the only constitutional warrant for such special taxation of property is special benefit thereto, and the question of whether or not the owner can have any relief in the courts of the land against this legislative edict, if it oversteps the bounds of the Constitution, recalls that question which was so earnestly debated in the early history of this Republic, to wit, as to whether or not there is any power in the judici-

ary to declare that an act of the legislature is void because contrary to the Constitution, and concerning which this court, speaking through Chief Justice Marshall in Marbury vs. Madison, 1 Cranch, 176, used the following language, which has ever since been accepted as decisive, to wit:

"The question, whether an act repugnant to the Con-
"stitution can become the law of the land, is a question
"deeply interesting to the United States; but, happily,
"not of an intricacy proportioned to its interest. It
"seems only necessary to recognize certain principles,
"supposed to have been long and well established, to
"decide it.

"That the people have an original right to establish,
"for their future government, such principles as, in their
"opinion, shall most conduce to their own happiness, is
"the basis on which the whole American fabric has been
"erected. The exercise of this original right is a very
"great exertion; nor can it, nor ought it, to be frequently
"repeated. The principles, therefore, so established, are
"deemed fundamental. And as the authority from which
"they proceed is supreme, and can seldom act, they are
"designed to be permanent.

"This original and supreme will organizes the govern-
"ment, and assigns to different departments their respect-
"ive powers. It may either stop here, or establish *certain*
"*limits not to be transcended by those departments.*

"The government of the United States is of the latter
"description. The powers of the legislature are defined
"and limited; and that those limits may not be mistaken,
"or forgotten, the Constitution is written. *To what pur-*
"*pose are powers limited, and to what purpose is that lim-*
"*itation committed to writing, if these limits may, at any*

"*time, be passed by those intended to be restrained?* The "distinction between a government with limited and "unlimited powers is abolished, if those limits do not con- "fine the persons on whom they are imposed, and if acts "prohibited and acts allowed are of equal obligation. It "is a proposition too plain to be contested that the Con- "stitution controls any legislative act repugnant to it; "or, that the legislature may alter the Constitution by an "ordinary act.

"Between these alternatives there is no middle ground. "The Constitution is either a superior paramount law, "unchangeable by ordinary means, or it is on a level "with ordinary legislative acts, and, like other acts, is "alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a "legislative act contrary to the Constitution, is not law; "if the latter part be true, then written Constitutions are "absurd attempts, on the part of the people, to limit a "power in its own nature illimitable.

"Certainly all those who have framed written Constitu- "tions contemplate them as forming the fundamental and "paramount law of the nation, and, consequently, the "theory of every such government must be, that an act of "the legislature, repugnant to the Constitution, is void.

"This theory is essentially attached to a written Con- "stitution, and is consequently to be considered, by this "court, as one of the fundamental principles of our society. "It is not, therefore, to be lost sight of in the further con- "sideration of this subject."

Of what possible benefit is it to the citizen that the Constitution provides that he shall not be deprived of his property without due process of law, that his property shall not

be taken from him, even for a public purpose, without just compensation, if the legislature has nevertheless the absolute power to say that his property shall be taken from him, even though he has received no compensation? Yet that power is what is contended for, and must be upheld, if the judgment in this case is affirmed.

In response to this, it may be claimed that the legislature *has determined*, as a matter of fact, that the right of way of the Louisville & Nashville Railroad Company adjacent to Frankfort Avenue *has been benefited* to the extent of the amount of this assessment, to wit, $3,176.72. *But that is not true;* and this court knows, on the face of this record and on the face of the statutes and ordinances involved, that it is not true. *There has been no such determination by the legislature or any other tribunal.* There has been no consideration of that question by any tribunal whatever. The legislative act involved, to wit, Section 2833 of the Kentucky Statutes (quoted as an appendix to the brief of defendant in error) is simply a GENERAL RULE, APPLICABLE TO ALL CASES, *without reference to the particular facts of any situation, or to the peculiar character, or nature, or value of any particular property.* It is simply an immutable rule that, in case of the improvement of a public street, the cost thereof shall be borne by the property on each side, extending back halfway to the next parallel street, if the territory be bounded by streets; and that, if it be not bounded by streets, the cost of the improvement shall be borne by the territory on each side thereof, extending back for such a distance as the council in the particular case may prescribe; but that, even in the latter case, while the council may fix the outer boundary lines of the district (where it is not bounded by streets), yet, when these outer boundaries are once fixed, then all property within those boundaries, without regard to character, condition or

value, shall pay the same rate for each square foot embraced therein. Now, this is not an adjudication, or a determination, either by the legislature or by the council, that in the particular case of the improvement of Frankfort Avenue all of the property between Frankfort Avenue and a line drawn halfway between it and the next parallel street is in fact benefited by this improvement to the extent of the cost of the improvement. It is not a determination by any tribunal that the section of the right of way of the Louisville & Nashville Railroad Company, which happens to lie within that territory, is benefited to the extent of the cost apportioned against it, to wit, $3,176.72. The apportionment of that cost against this particular property, is simply the result of the application of a general, ironbound rule, which the legislature, several years ago, before this improvement was ever undertaken, declared should be applied *to all cases* of the improvement of streets, *without regard to the individual facts of any case.* It is *a law, a rule*, as distinguished from *a decision.* And while it is true that the act contains the provision heretofore mentioned, to the effect that the court in which any suit may be pending "shall make all corrections, rules and orders to do justice to all parties concerned," yet the courts of Kentucky have construed that as not permitting any individual whose property is thus assessed to show that the cost assessed against his property is in substantial excess of the benefit accruing thereto, unless he can show, that the cost assessed against his property is absolutely *equal to the value of the property*, so as to "*entirely* take from the citizen his property." In other words, the courts of Kentucky have construed this to mean that the citizen can have no relief from the operation of this rule (enacted without regard to the facts of any individual case), if he is thus arbitrarily deprived of *half* the value of his property, or *three-fourths* of the value

of his property; and that the court will not interfere, unless the *whole of his property* is taken away from him. Under the Constitution the State is as powerless to deprive the citizen of half of his property without compensation as it is to deprive him of the whole of it without compensation. And yet under this statute, as construed by the courts of Kentucky, and as applied in the case at bar, the defendant is deprived, under the simple operation of a legislative edict, without any regard to the facts of the case, of property to the value of $3,176.72, certainly a "substantial" sum, without any compensation whatever, thus absolutely overriding the limitations of the Constitution. And in conclusion we may ask, in the language of Chief Justice Marshall:

> "To what purpose are powers limited, and to what "purpose is that limitation committed to writing, if these "limits may, at any time be passed by those intended to "be restrained?"

We respectfully ask that he motion to dismiss or affirm be overruled.

Respectfully submitted,

HELM BRUCE,
Attorney for Plaintiff in Error.

JAMES P. HELM,
Of Counsel.

Nov. 11th, 1904.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error,*

vs.

BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE, - *Defendants in Error.*

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

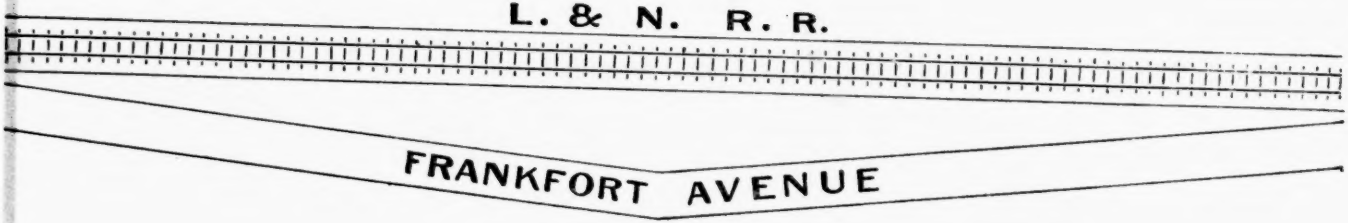
The railroad of the Louisville & Nashville Railroad Company through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said

above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reasons stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in
"the manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.


L. & N. R. R.
FRANKFORT AVENUE

"It says it does now own and for many years has owned "a line of railroad extending from Newport, Ky., to and "through Louisville, Ky., and thence southwardly through "Kentucky and other States.

"It owns, and has long owned, a perpetual right of way "for railroad purposes from Newport to and into Louis- "ville, over a long strip of land, which is about 110 miles "long and about 66 feet wide, on which is constructed its "roadbed, and over which are operated its trains between "and into the cities aforesaid. Occasionally, for short "distances, the width of the right of way as above given "varies, but that given above is the usual width, and is "its greatest width at the place referred to in the petition "herein. The said right of way passes over the parcel of "land described in the petition herein as belonging to this "defendant; in other words, it constitutes a section of "said indivisible and continuous right of way between the "cities aforesaid; and the only interest of defendant in "said land is an easement therein, to wit, the perpetual "right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in the "cities aforesaid, and on the same are laid two tracks, par- "allel with the northerly and southerly lines of said par- "cel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used*

"*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to the* "*slightest degree by the improvement of Frankfort Avenue* "*as set forth in the petition herein. On the contrary, the* "*existence of said avenue and the improvement thereof,* "*which will lead probably to an increase in the use thereof,* "*being very close to the said right of way of defendant,* "*is a positive injury to defendant and its said right of* "*way, rather than a benefit.* Said right of way could be "more safely and advantageously used by defendant for "the only purpose for which it does or can ever use it, if "said Frankfort Avenue were entirely removed from

"within the territory described in plaintiff's petition as a "tax district, than it can with said avenue in said district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defendant "of its property without due process of law, and would "deny to it the equal protection of the laws, contrary to "the provisions of the Fourteenth Amendment to the "Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec., 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it for the cost of this public improvement was "in substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged, and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that

judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error. Defendants in error have now moved to dismiss or affirm.

MOTION TO DISMISS.

We are not advised of the ground upon which the motion to dismiss is made. Not a word is said about it in the brief filed by defendants in error. The answer makes the federal question as plain as the English language can make it; and the motion to dismiss was evidently made merely in order to afford an opportunity for making a motion to affirm; which seems to us to be a manifest abuse of the rule of this court governing such cases.

MOTION TO AFFIRM.

Subsection 5 of Rule 6 of this court says:

> "There may be united with a motion to dismiss a writ "of error or an appeal, a motion to affirm on the ground "that, although the record may show that this court has "jurisdiction, it is manifest the writ or appeal was *taken* "*for delay only*, or that the question on which the juris- "diction depends is *so frivolous as not to need further* "*argument*."

There is certainly nothing in this record to show that this writ was taken for delay only, and we do not see how it can be said under the state of the decisions to which we shall refer, that the federal question involved is "so frivolous as not to need further argument."

I.

Of course, we are familiar with the opinions of this court, first in Norwood vs. Baker, 172 U. S. 269, and then in French vs. Barber Asphalt Paving Company, 181 U. S. 324, and other cases decided on the same day.

The court in the latter cases did not overrule Norwood vs. Baker, nor retract the fundamental principle therein asserted. We do not rely alone upon our own interpretation of the opinions in question. In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court said:

"In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common "understanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that "there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made "according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-*

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

No. 170.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

vs.

BARBER ASPHALT PAVING COMPANY, - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Of Counsel.

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P. C. SUNNEMACHER PRESS, LOUISVILLE, KY.

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Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Plaintiff in Error,*

vs.

BARBER ASPHALT PAVING COMPANY, . *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

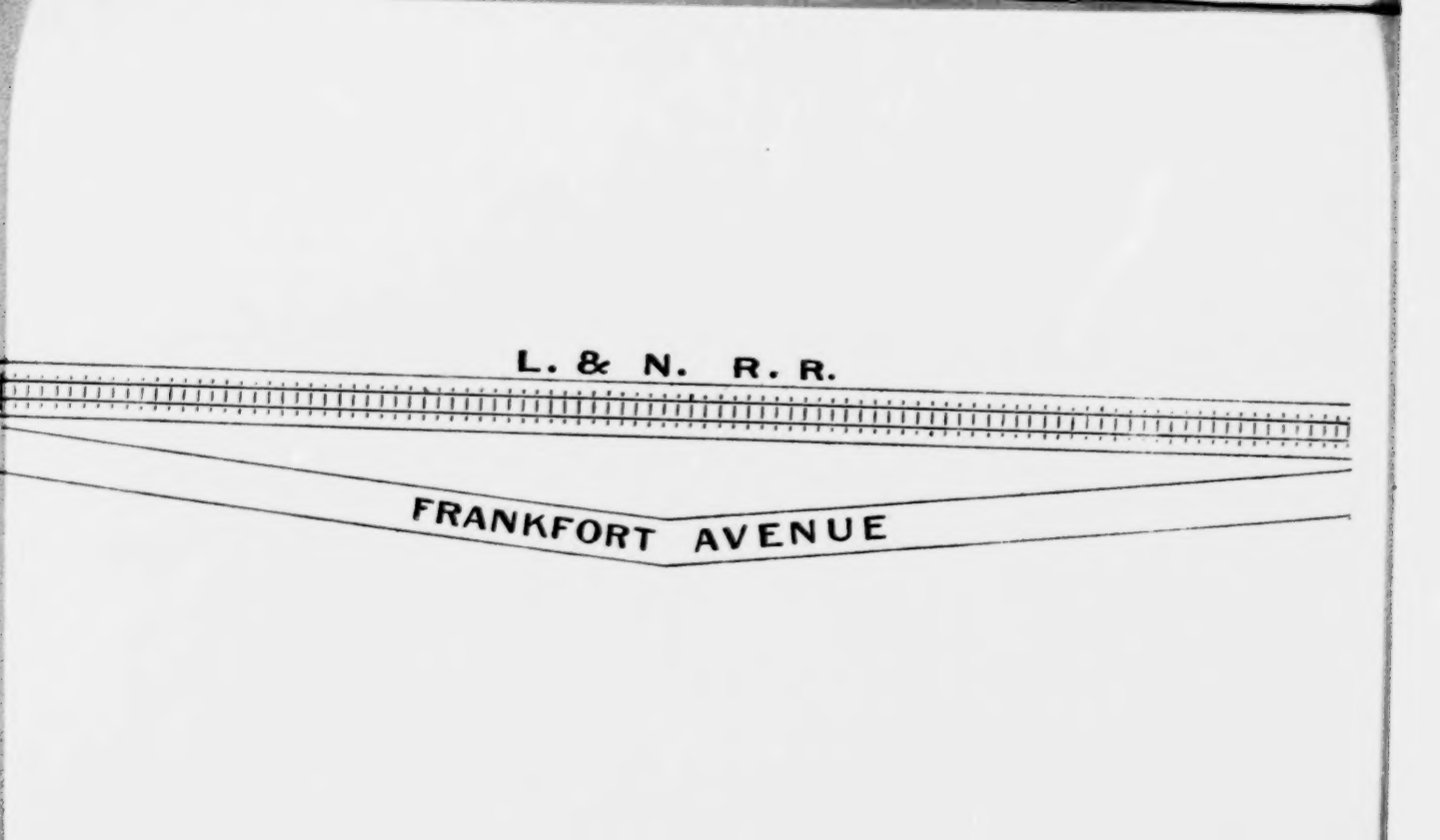
The record in this cause is brought here by a writ of error to the Court of Appeals of Kentucky.

The object of the suit is to subject a section of the *right of way of a railroad* to the payment of a large sum as part of the cost of improving a street which lies practically side by side with the right of way for about one-third of a mile; although it is conceded that the right of way does not, and can not, derive the slightest benefit from the improvement of the street, but that, on the contrary, the existence of the street adjacent to the railroad is a disadvantage rather than an advantage. The railroad company insists that to subject its property to this payment, assessed against it on what is known as the "special assessment plan," is to deprive the company of its property without due process of law, contrary to the provisions of the Federal Constitution.

The railroad of the Louisville & Nashville Railroad Com-

pany through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reason stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states


L. & N. R. R.
FRANKFORT AVENUE

the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in the
"manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.

"It says it does now own and for many years has owned
"a line of railroad extending from Newport, Ky., to and
"through Louisville, Ky., and thence southwardly through
"Kentucky and other States.

"It owns, and has long owned, a perpetual right of way
"for railroad purposes from Newport to and into Louis-
"ville, over a long strip of land, which is about 110 miles
"long and about 66 feet wide, on which is constructed its
"roadbed, and over which are operated its trains between
"and into the cities aforesaid. Occasionally, for short
"distances, the width of the right of way as above given
"varies, but that given above is the usual width, and is
"its greatest width at the place referred to in the petition
"herein. The said right of way passes over the parcel of
"land described in the petition herein as belonging to this
"defendant; in other words, it constitutes a section of
"said indivisible and continuous right of way beween the
"cities aforesaid; and the only interest of defendant in
"said land is an easement therein, to wit, the perpetual

"right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in "the cities aforesaid, and on the same are laid two tracks, "parallel with the northerly and southerly lines of said "parcel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used* "*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to* "*the slightest degree by the improvement of Frankfort* "*Avenue as set forth in the petition herein. On the con-* "*trary, the existence of said avenue and the improvement* "*thereof, which will lead probably to an increase in the use* "*thereof, being very close to the said right of way of* "*defendant, is a positive injury to defendant and its said* "*right of way, rather than a benefit.* Said right of way "could be more safely and advantageously used by defend- "ant for the only purpose for which it does or can ever "use it, if said Frankfort Avenue were entirely removed "from within the territory described in plaintiff's petition "as a tax district, than it can with said avenue in said "district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defend-* "*ant of its property without due process of law, and* "*would deny to it the equal protection of the laws, con-* "*trary to the provisions of the Fourteenth Amendment to* "*the Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec. 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it

for the cost of this public improvement was in "substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged; and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error.

The improvement of the street was made under a statute of Kentucky, passed July 1, 1893, being an act for the government of cities of the first class in the State, in which class the city of Louisville falls. The provisions of this statute are found in the compilation officially termed "Kentucky Statutes." Those sections of the statute which, so far as we know, are supposed to have any bearing on the present case, are given in full in an appendix to this brief, the sections being numbered as they are numbered in the Kentucky Statutes, running from Section 2832 to Section 2839, both inclusive.

This statute in substance provides that "when the improvement is the original construction of any street, * * * such improvement shall be made at the exclusive cost of the owners of lands in each fourth of a square, to be *equally* apportioned by the Board of Public Works *according to the number of feet* owned by them respectively."

It then defines a "square" as follows, to wit: 'Each

subdivision of the territory bounded on all sides by principal streets shall be deemed a square." But of course it was manifest to the framers of the statute that a street might be built or improved through a section of the city where streets have not been regularly laid out, so as to define it into squares. And accordingly the statute provides that: "When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the *depth* on both sides fronting said improvement, to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance."

Thus it will be seen that, where the property contiguous to the improvement in question has been defined into squares, the statute fixes an inflexible rule for *all cases*, under which rule the property lying on each side of the street improved, and extending halfway back to the next parallel street, is assessed for the cost of the improvement; the assessment being laid on every lot of land included within these limits "equally * * * according to the number of feet" in them respectively. The statute does not use the expression "halfway back to the next parallel street," but it says, the improvement shall be made "at the exclusive cost of the owners of lands in *each fourth of a square*." And this has always been considered to mean that, where the contiguous territory is defined into squares by principal streets, the assessment on each side must extend halfway back to the next parallel street, thus including two quarter squares on each side of the street improved. This rule is inflexibly followed, even when the distance to the next parallel street on one side is greater than the distance to the next parallel street on the other side of the street improved. (Cooper vs. Nevin, 90 Ky. 89, 92.)

But when the contiguous territory is not defined into squares by streets, then it is manifest that the rule of going halfway back to the next parallel street could not possibly be followed, because there is no parallel street. It was necessary therefore to prescribe a rule for such a case; and accordingly the statute provides, as we have seen, that the City Council, in passing the ordinance for the improvement in such a case, shall define "the *depth* on both sides fronting said improvement to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively within the depth, as set out in the ordinance."

It will be observed that where the property is defined into squares the council, in passing the ordinance, is given no discretion whatever as to the property upon which the assessment is to be laid, or as to how much shall be assessed upon one lot and how much upon another. The statute itself fixes the rule, to wit, that the assessment shall extend back halfway to the next parallel street, and that all property within that territory shall be assessed equally according to the number of square feet in each lot embraced therein. Speaking of that section of the statute, or rather of a section in exactly the same language in a pre-existing statute, the Court of Appeals of Kentucky said:

> "Under this provision of the charter, where the prop-
> "erty is bounded on all sides by principal streets, or the
> "territory is laid off into squares, there is no difficulty in
> "making the assessment; the charter in such a case has
> "provided the manner in which the assessment shall be
> "made, and every foot of land within the fourth of a square
> "must contribute to pay for the improvement. The City
> "Council orders the improvement, and *the law* provides the
> "mode of assessment and *the property to be assessed.*"
> (Loeser vs. Redd, 14 Bush, 20.)

So, when the property adjacent to the street improved is *not* defined into squares by principal streets, the only discretion which the council has is in fixing "*the depth*" to which the assessment shall extend on each side of the street; in other words, how far back a parallel line shall be drawn between which and the improvement all the property must be equally assessed according to the number of square feet therein. Even in this case the council has absolutely no right to consider differences of situation as between the various pieces of property within the defined territory. It only has the discretion of saying how far back from the improvement the outer boundary line of the district to be assessed shall be laid; this being necessary because the rule which prevails under the statute when the property is divided into squares can not prevail when it is not defined into squares.

But the district to be assessed having been fixed by the statute itself, where the property is defined into squares, or having been fixed by the council by merely locating the outer boundary line, when the property is not defined into squares, no discretion or judgment whatever is allowed to the council as to the amount of burden to be imposed upon any particular part of the property included within this boundary. All property thus included must, under the mandate of the statute, be assessed "equally," according to the number of square feet owned by each owner of property therein. No consideration whatever is allowed of the character of the improvement, or the nature, or situation, or value of any particular lot within the prescribed territory. The outer boundaries of the territory upon which the burden is to be laid are ascertained, the cost of the improvement is ascertained, all other considerations are rejected, and the same cost is laid upon each square foot within that territory by a mathematical calculation; although there may be some property within the

territory which, on account of its peculiar character, or situation, or on account of the peculiar character of the street, receives absolutely no benefit from the making of the street, but, on the contrary, may be injured by it.

It is true, the statute contains the following provision:

> "No error in the proceedings of the General Council "shall exempt from payment, after the work has been done "as required by either the ordinance or contract; but the "General Council, or the courts in which suits may be "pending, shall make all corrections, rules and orders to do "justice to all parties concerned." (Sec. 2834.)

But while this gives to the council and to the court the right to correct errors, it does not give to either the right to enter upon the consideration of the question as to whether any particular piece of property is or is not benefited by the improvement for which the charge is made. And so the Court of Appeals has construed the law. It is not necessary to go beyond the case at bar to discover this. For in the answer of defendant it pleaded in unambiguous terms that its right of way herein sought to be charged was not benefited to the slightest extent by the improvement in question, but that the improvement was an injury rather than a benefit; and these allegations were admitted to be true, and yet were held by the court to constitute no defense.

The Circuit Court said: "The question of benefits is determined *by the legislature*, and can not be raised as is attempted to be done in this case by the Louisville & Nashville Railroad Company in the second paragraph of its answer." (R. 28.)

And the Court of Appeals, in affirming the judgment, said, quoting from one of its opinions in a former case: "Necessarily individual cases of hardship will arise, but it

(the Kentucky system) approaches an equality as nearly as it is practicable. It follows that the lot owner may be compelled to pay his proportion of the cost of an improvement, *although in his particular case his property may not be benefited.* This rule, however, can not be so extended as to *entirely* take from the citizen his property. This would work 'a manifest injustice.' It would be spoliation, and not taxation. *Under the guise of benefit and taxation he can not be thus arbitrarily deprived of his property.* It would be an appropriation of it by the exercise of an arbitrary power to public use without compensation." (R. 69.)

In other words, if the citizen owns property worth $5,000, and an improvement is made which is of *no benefit* at all to the property, and the cost of which assessed against this lot is $2,500, this, being only *half* the value of the property, will therefore take only *half of the property* to pay it; and, according to the view of the Court of Appeals of Kentucky, this would be a constitutional assessment, and the court could give no relief. If, however, the cost of the improvement assessed against this property is $5,000, this *equals* the value of the property, and will take the *whole property* to pay it; the citizen's property will, therefore, be "entirely" taken from him. This, says the court, would be "spoliation and not taxation." It would, "under the guise of benefit and taxation," be "but an appropriation of it, by the exercise of an arbitrary power, to public use without compensation." In the opinion of the Court of Appeals it is unlawful to take *everything* the citizen has without compensation, but entirely lawful to take *half of it* without compensation.

Thus we have presented this state of case: The legislature, in 1893, seven years before the improvement now in question was made, adopted a *general rule*, without any regard whatever to individual cases or conditions, that when-

ever a street should be improved through a section of territory which had been defined into squares by streets running through it, the cost of the improvement should be assessed against the adjacent territory halfway back to the next parallel street. This was not the decision of questions arising out of a past condition, but it was the enunciation of a rule for future conduct. And it was not a mere general rule of *prima facie* application; but a universal, immutable rule. And the highest court of the State has held that, under it, the citizen's property, though not benefited at all by a given improvement, may be taken to pay for the same, provided only that the whole property be not taken.

Under this statute the General Council of the City of Louisville passed an ordinance on June 6, 1900, as follows, to wit:

"Be it ordained by the General Council of the City of "Louisville:

"That the carriage way of Frankfort Avenue, from the "center line of Cavewood Avenue, extended, to the center "line of Raymond Avenue, extended, shall be forty (40) "feet in width, and shall be improved by grading, curbing "and paving with the asphalt pavement. Said work shall "be done in accordance with the plans and specifications "on file in the office of the Board of Public Works, and at "the cost of owners of ground on the northerly side of "Frankfort Avenue, from the center line of Clifton Avenue "and Clifton Avenue extended, to the center line of Ewing "Avenue and Ewing Avenue extended, *and extending back "to a depth of 195 feet;* and on the southerly side of "Frankfort Avenue, from the center line of Raymond Ave-"nue and Raymond Avenue extended, *and extending back "to a depth of 195 feet.*

"The cost to be *equally apportioned* among the owners "of property *according to the number of square feet* of

"ground owned by the parties respectively within the "limits above set out, and that all ordinances in conflict "herewith be and are hereby repealed." (R. 9.)

It will be observed that this ordinance attempts to prescribe the *depth* of territory to which the assessment shall extend, to wit, 195 feet on each side of the street improved. This was on the theory that the territory adjacent to Frankfort Avenue was not defined into squares; and the petition in the case at bar alleges such to be the fact. (R. 3.) But the court subsequently held that the territory was defined into squares, and that the statutory rule must apply of going halfway back to the next street. (R. 33.) This took in a little more territory, and therefore reduced slightly the assessment per square foot.

A section of the right of way of the Louisville & Nashville Railroad was embraced under either mode of designating the territory to be taxed. Under the mode attempted to be adopted by the council, the assessment against the right of way of the Louisville & Nashville Railroad Company was $3,472.94. Under the mode adopted by the court, this assessment was reduced by the sum of $296.22, and was fixed at sums aggregating $3,176.72. (R. 50.)

In the suit to enforce this assessment the company answered, as we have seen, that this right of way was not, and could not possibly be, benefited to the slightest extent by the improvement in question, and that it could not be constitutionally taken to pay for it. The defendant did not allege, and could not truthfully allege, that the assessment was *equal* to the value of the property, and that it would "entirely" take the property to pay it; but the petition showed that the assessment was for $3,472.94, and the answer stated that the property, to wit, this right of way, was not benefited to any

extent by the improvement, but, on the contrary, was impaired in value by it, thus showing certainly an assessment "in substantial excess of the special benefits accruing to it." *And these facts were admitted.* Yet the court, using the language heretofore quoted, held in effect, that, because the property was not "entirely" taken, no relief could be given, and ordered the property sold to pay the assessment. Was that right? That is the question.

ASSIGNMENT OF ERRORS.

The plaintiff in error complains that the court erred in holding that by this proceeding there could be exacted from it, as the owner of the right of way in question, a substantial sum as the cost of a public improvement, when it was admitted, and is a fact, that *no benefit whatever* accrued to the property thus assessed from the improvement for which the assessment was made. In other words, plaintiff in error complains that—

> "the exaction from (it) the owner of private property of
> "the cost of a public improvement in substantial excess
> "of the special benefits accruing to him is, to the extent
> "of such excess, a taking, under the guise of taxation, of
> "private property for public use without compensation."

ARGUMENT.

I.

Constitutional Basis of Special Assessments.

So far as we are aware, it has been universally held that the only constitutional basis for taxation by special assessments upon selected property, as distinguished from general taxation, is *special benefits* to the property assessed accruing from the improvement for which the assessment is made.

Judge Dillon in his work on Municipal Corporations, summarizing the law on this subject, says:

> "Special benefits to the property assessed, that is, bene-
> "fits received by it in addition to those received by the
> "community at large, is the true and only just foundation
> "upon which local assessments can rest." (2 Dillon, Mun. Corp. §761, Subsec. 3.)

In Barnes vs. Dyer, 56 Vt. 469, 471, the court said:

> "The act in question made no express allusion to
> "assessment on account of benefit; neither does it limit
> "the assessment to the amount of benefit. Yet, as we
> "have seen, the right to assess at all depends solely on
> "benefit, and must be apportioned to and limited by it."

In McCormack vs. Patchin, 56 Mo. 33, 36, the court said:

> "The whole theory of local taxation or assessments is
> "that the improvements for which they are levied afford
> "a remuneration in the way of benefits. The law which
> "would attempt to make one person, or a given number
> "of persons, under the guise of local assessments, pay a
> "general revenue for the public at large, would not be an
> "exercise of the taxing power, but an act of confiscation."

In the State vs. Mayor of Newark, 37 N. J. Law, 415, the court, through Chief Justice Beasley, said:

"In a government in which the legislative power is not "omnipotent, and in which it is a fundamental axiom "that private property can not be taken without just "compensation, the existence of an *unlimited right* in the "lawmaking power to *concentrate the burden* of a tax "upon specified property *does not exist.* If the statute "should direct a certain street in a city to be paved, and "the expense of such paving to be assessed on the houses "standing at the four corners of such street, this would "not be an act of taxation, and it is presumed that no "one would assert it to be such. If this can not be "maintained, then it follows that it is conceded that the "legislative power in question is not *completely arbitrary.* "It has its limit; and the only inquiry is, where that "limit is to be placed.

"This question was considered, and, as it was supposed, "was definitely settled by this court in the case of the "Tidewater Co. vs. Coster, reported in 3 C. E. Green, 519. "The principle sanctioned by that decision was that the "cost of a public improvement might be imposed on *par-* "*ticularized property* to the extent to which such prop- "erty was *exceptionally benefited;* and that any *special* "*burthen beyond that measure was illegal.* It was upon "this principle that the case was rested. The rule thus "adopted stands upon the idea that it establishes a "standard by which, with at least an approach to pre- "cision, an act of taxation may be distinguished from an "act of confiscation." (p. 421.)

In Hammett vs. Philadelphia, 65 Pa. St. 146, 153, the court, speaking through Judge Sharswood, said:

"If the sovereign breaks open the strong box of an

"individual or corporation and takes out money, or, if not "being paid on demand, he seizes and sells the lands or "goods of the subject, it looks to me very much like a "direct taking of private property for public use. It "certainly can not alter the case to call it taxation. When- "ever a local assessment upon an individual is not "*grounded upon and measured by the extent of his partic-* "*ular benefit*, it is *pro tanto, a taking of his private* "*property for public use without any provision for compen-* "*sation.*"

In King vs. Portland, 38 Oregon, 402, 63 Pacific, 1, the judgment in which was afterward affirmed by this court (184 U. S. 61), the court, after referring to the principle upon which general taxation rests, then said:

"Local or special assessments for local benefits stand "upon a different basis. They are made and sustained "upon the assumption that a prescribed portion of the "community is to be especially benefited in the enhance- "ment of the value of the property peculiarly situated, "as regards the proposed expenditure of the funds to be "raised by the assessment. It is but a demand of simple "justice that special contributions in consideration of "special benefits, should be made by those receiving the "benefits, but such contributions *ought not*, by the same "demand of justice, *to be enforced in any case beyond the* "*benefits received.*" (p. 418.)

Even the Court of Appeals of Kentucky admits that the only *constitutional basis* for special assessments is special benefits. In the case of Preston vs. Roberts, 12 Bush, 587, the court said:

"All municipal assessments are based on the ground "that the property subjected to assessment is benefited by

"the improvement for which the assessment is made, and "neither the legislature of the State nor of the municipal- "ity can constitutionally subject property not actually or "presumptively benefited by an improvement to assess- "ment to pay the cost of such improvement." (p. 587.)

Finally the matter came before this court in a case which has probably been as widely discussed as any one decided by this court in recent years, to wit, Norwood vs. Baker, 172 U. S. 269; and in that case this court discussed the entire question of the nature, the foundation, and the limitations of the power of taxation in the form of special assessments, and it therein stated the law in the following unmistakable language, to wit:

"Undoubtedly abutting owners may be subjected to "special assessments to meet the expenses of opening "public highways in front of their property—such assess- "ments, according to well established principles, resting "upon the ground that special burdens may be imposed "for special or peculiar benefits accruing from public "improvements. * * * But the power of the legis- "lature in this matter is not unlimited. There is a point "beyond which the legislative department, even when "exerting the power of taxation, may not go consistently "with the citizen's right of property. As already indi- "cated, the principle underlying special assessments to "meet the cost of public improvements is that the prop- "erty upon which they are imposed is peculiarly "benefited, and therefore the owners do not, in fact, pay "anything in excess of what they received by reason of "such improvements. But the guarantees for the "protection of private property would be seriously

"impaired if it were established as a rule of constitutional "law that the imposition by the legislature upon particu- "lar private property of the entire cost of a public "improvement, irrespective of any peculiar benefits "accruing to the owner from such improvement, could "not be questioned by him in the courts of the country. "It is one thing for the legislature to prescribe it as a "*general* rule that property abutting on a street opened "by the public shall be deemed to have been specially "benefited by such improvement, and therefore should "specially contribute to the cost incurred by the public. "It is quite a different thing to lay it down as an *abso-* "*lute* rule that such property, whether it is in fact "benefited or not by the opening of the street, may be "assessed by the front foot for a fixed sum representing "the whole cost of the improvement, and without any "right in the property owner to show when an assess- "ment of that kind is made, or is about to be made, that "the sum so fixed is in excess of the benefits received.

"In our judgment the exaction from the owner of pri- "vate property of the cost of a public improvement in "substantial excess of the benefits accruing to him is, *to* "*the extent of such excess*, a taking, under the guise of "taxation, of private property for public use without "compensation. We say 'substantial excess,' because "exact equality of taxation is not always attainable, and "for that reason the excess of cost over special benefits, "unless it be of a material character, ought to be regarded "by a court of equity when its aid is invoked to restrain "the enforcement of a special assessment." (pp. 278, 279.)

The principle as to the constitutional basis of this character of taxation is here stated so plainly that there can be

no controversy over its meaning. It is true that three of the members of this court dissented ; but a majority concurred, and the law as thus established became the law of the land. How different is this principle from that applied to the case at bar. This court, in Norwood vs. Baker, said that it was unlawful to impose upon the property of the citizen a special assessment "in substantial excess" of the benefits conferred. But the Court of Appeals of Kentucky has said in the case at bar that an assessment may be imposed which *is in substantial excess* of the benefit conferred, provided only that the property of the citizen is not "*entirely*" taken to pay the assessment. The principle stated by this court is logical, that stated by the Court of Appeals is absolutely illogical. It has no foundation, either in reason or in the Constitution, either of Kentucky or of the United States. There is nothing anywhere, in any Constitution, which says that you can take half of the citizen's property for public use without just compensation, but you can not take it all.

After the decision in Norwood vs. Baker came that in French vs. Barber Asphalt Paving Co., 181 U. S. 324, and other cases of similar character decided the same day.

We have read every line, not only of the many opinions delivered by the court in the several cases decided at the same time with French vs. Barber Asphalt Paving Company, but we have read the statements of facts in all of those cases, as given by the court, and we have not been able to find anywhere any retraction of the essential principle expressed in the words heretofore quoted from Norwood vs. Baker ; nor have we been able to find any *condition of facts* presented in any of those cases, so far as is shown by the court's opinions, or its statements of facts, which called for a decision of the question as to whether or not an assessment which is *in fact in substantial excess of the benefits accruing to the property*

must nevertheless be upheld. In all of those cases the attack was simply upon *the legislative act*, or municipal ordinance, under which the proceeding was had. We have not been able to find the statement, in a single one of the cases, that *as a matter of fact* the cost sought to be assessed upon the property involved was in substantial excess of the benefit accruing to it. If any such fact appeared in any record then before the court, that fact is not stated in any statement of fact or opinion of the court then made or delivered; and surely nothing which the court decided was in view of any such consideration. In the first and leading case of the series, to wit, French vs. Barber Asphalt Paving Company, the court, after referring to Norwood vs. Baker and to the principle thereby established, and, without to any extent retracting the same, says:

"It may be conceded that courts of equity are always "open to afford a remedy where there is an attempt, "under the guise of legal proceedings, to deprive a person "of his life, liberty or property without due process of law. "And such, in the opinion of a majority of the judges of "this court, was the nature and effect of the proceedings "in the case of Norwood vs. Baker.

"*But there is no such state of facts in the present case.* "Those facts are thus stated by the court of Missouri:

"'The work done consisted of paving with asphaltum "the roadway of Forest Avenue in Kansas City, thirty-"six feet in width, from Independence Avenue to Twelfth "Street, a distance of one-half a mile. Forest Avenue is "one of the oldest and best improved residence streets in "the city, and all of the lots abutting thereon, front the "street and extend back therefrom uniformly to the depth "of an ordinary city lot to an alley. The lots are all

"improved and used for residence purposes, and all of "the lots are substantially on the grade of the street as "improved, and are similarly situated with respect to the "asphalt pavement. The structure of the pavement along "its entire extent is uniform in distance and quality. "There is no showing that there is any difference in the "value of any of the lots abutting on the improvement.'" (181 U. S. 345.)

This is the statement of facts upon which the case was decided, from which it is seen that there is an entire absence of any showing that the cost of the improvement was in substantial excess of the benefits accruing therefrom. Not a word is said on that subject. But the proposition upon which the property owner there resisted the assessment was, that the act and ordinance under which the assessment was made were unconstitutional, because no provision was made for a hearing upon the question of benefits. He did not insist as a matter of fact that there was no benefit, or that the cost was in excess of the benefit, but he simply said the statute does not provide for a hearing before the assessing tribunal, and therefore the statute is void *in toto* as to all cases.

It will doubtless be contended for defendants in error, as it was contended on the motion to dismiss or affirm, that this court, in the case of Walston vs. Nevin, 128 U. S. 578, upheld the validity of the Statutes of Kentucky governing special assessments. But an examination of the opinion in that case will immediately show that the court's attention, as in the case of French vs. Barber Asphalt Paving Company, was directed entirely to the *validity of the statute.* The question as to whether or not the enforcement of an assessment which was *in fact substantially in excess of the benefit* would be the deprivation of property without due process of law

was neither considered nor decided. The court upheld the statute largely on account of the provision in it heretofore quoted, to the effect that "the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned." But we have already shown that the courts of Kentucky, notwithstanding this provision of the statute, hold that a party is not entitled to show that his property is not benefited by the work for which the assessment is imposed upon it; and the court so held in the case at bar. Whether or not that is a proper construction of the statute, and whether or not the court, under that statute ought, in order "to do justice to all parties concerned," to have allowed defendant to show that its peculiar property was not and could not be benefited to the slightest extent by this improvement, is not now a material question. It matters not to the defendant (plaintiff in error), nor does it make any difference in point of law, whether the fault in taking defendant's property without due process of law lies with a legislature or a court; for the prohibitions of the Fourteenth Amendment to the Federal Constitution against depriving any person of his property without due process of law, are not leveled only against the legislative department of the State, but run against the judicial and executive departments as well. Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226, 233.

Several cases have been decided by this court since French vs. Barber Asphalt Paving Company, and involving this same question, but in none of them has the court ever yet retracted its statement of the fundamental principle of Norwood vs. Baker, as stated in the language quoted above.

We have heretofore referred to the fact that the Oregon case of King vs. Portland, came to this court, where the judgment of the Supreme Court of Oregon was affirmed

(184 U. S. 61); and this court quotes with apparent approval—certainly without any dissent—the following language of the Supreme Court of Oregon, expressing a summary of the law deducible from adjudged cases, to wit:

> "But we are inclined to believe that the better doctrine, "deducible from adjudged cases, including those of the "Supreme Court of the United States, is that *the assess-* "*ment will be upheld whenever it is not patent and obvious*, "from the nature and location of the property involved, "the district prescribed, the condition and character of "the improvement, the cost and relative value of the "property to the assessment, *that the plan or method* "*adopted has resulted in imposing a burden in substantial* "*excess of the benefits*, or disproportionate within the "district as between owners." (184 U. S. 69.)

The manifest inference from this statement is that, where such condition *is* patent and obvious, the assessment will *not* be upheld.

In Voigt vs. Detroit, 184 U. S. 115, the court affirmed the judgment of the Supreme Court of Michigan which upheld the validity of a tax statute of that State, but upon the ground that the statute, as construed by the State court, allowed the property owner to be heard on the question of benefit. This court, referring to the decision of the State court, said:

> "The Supreme Court of the State decided, as we have "seen, 'that the amount of the taxes which may be "assessed upon the district or upon any given parcel of "land can not exceed the benefits.' On the hearing given, "therefore, the property owner can show a violation of "the rule, if a violation there be, and the showing will "take his land out of the district and relieve it from the "tax." (184 U. S. 122.)

In Schaefer vs. Wurling, 188 U. S. 516, this court affirmed the judgment of the Supreme Court of Indiana (156 Ind. 704), which had upheld the validity of the Indiana tax statute in a brief opinion, simply resting the decision upon the authority of Adams vs. City of Shelbyville, 154 Ind. 467, in which case the Supreme Court of Indiana had exhaustively considered and decided the principles upon which special assessments rest, and had then construed the Indiana statute as complying with these principles. The language of the Supreme Court of Indiana in this case of Adams vs. City of Shelbyville, 154 Ind. 467, is very strong, and conforms exactly to what we have heretofore stated as the underlying principle of special assessments. The court says:

"We conclude, therefore, that the principles applicable "to assessment for local improvements are these: The "legislature may create, or authorize a municipality to "create, a local taxing district for local improvement "proposed which includes part only of the property "within the municipality. The legislature may declare "conclusively that only the property within the taxing "district shall be specially assessed on account of local "improvement within that district. *Each parcel of con-* "*tributing property may be assessed only to the extent* "*that it actually receives special benefits.* The taxing "district, as a whole, may be assessed only to the extent "of the sum of the special benefits actually received by "the several parcels of contributing property. The "improvement, so far as its cost exceeds the special "benefits resulting to the several parcels of property in "the taxing district, is a benefit to the municipality at "large, and such excess must be borne by the general "treasury. Property owners affected by an improvement "within a taxing district are entitled to a hearing on the "question of special benefits." (pp. 477, 478.)

In the late case of Lathrop vs. City of Racine, 119 Wis. 461, the Supreme Court of Wisconsin had occasion to review this subject in the light of the decisions by this court both in Norwood vs. Baker and French vs. Barber Asphalt Paving Company, and considered that the fundamental principle of Norwood vs. Baker was not impaired by French vs. Barber Asphalt Paving Company. The court said:

"The Supreme Court of the United States has recently "declared the true rule applicable in a case like this as "follows: 'The principle underlying special assessments "upon private property to meet the cost of public improve- "ments is, that the property upon which they are imposed "is peculiarly benefited, and therefore that the owners do "not in fact pay anything in excess of what they receive "by reason of such improvement. The exaction from "the owner of private property of the cost of a public "improvement in substantial excess of the special benefits "accruing to him, is to the extent of such excess, a taking, "under the guise of taxation, of private property for pub- "lic use without compensation.' Norwood vs. Baker, 172 "U. S. 269. That was a case in equity, the same as this. "The case was considered in the latter case of French vs. "Barber Asphalt Paving Company, 181 U. S. 324, in "which the court divided, but the majority of the court "as well as the minority reaffirmed the decision in Nor- "wood vs. Baker, *supra*." (p. 475.)

In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court had occasion to consider expressly the question of the combined effect of Norwood vs. Baker and French vs. Barber Asphalt Paving Company, and said:

"In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common

"misunderstanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that* "*there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made* "*according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-* "*tical operation do confiscate property*, are obnoxious to "the Fourteenth Amendment to the Constitution of the "United States, and for that reason it is the duty of the "courts to declare them to be void. That special assess- "ments to pay for local improvements of public streets "and highways, *do, in practical effect, deprive owners of* "*their property without due process of law, unless the* "*property subject to assessments is benefited by the* "*improvements correspondingly to the amount of the assess-* "*ment.* That owners of property have the right to appeal "to the courts for judicial protection against the uncon- "stitutional invasion of their rights by municipal govern- "ments in enforcing State laws or local regulations for "the collection of assessments *which are in excess of the*

"*benefits to the property assessed*, accruing or to accrue "by reason of the improvements to be paid for by such "assessments. *These principles remain unaffected by the* "*recent decisions of the Supreme Court.*" (pp. 33, 34.)

And speaking of this opinion, the editor of the Central Law Journal says:

"Without hesitation we pronounce this decision not "only eminently just and equitable, but also among the "foremost of the decisions of this question by reason of "its clear recognition and elucidation of right principle "and sound law." (53 Central Law Journal, 281.)

After the enunciation by this court of the principle involved in Norwood vs. Baker, it was received by the Supreme Courts of many of the States with, we might almost say, enthusiastic approval, as being manifestly and eminently just.

In Sears vs. Board of Aldermen of Boston, 173 Mass. 71, the Supreme Court of Massachusetts said:

"It is now established by the highest judicial authority "that such assessments (special assessments) can not be "so laid upon any estate as to be in substantial excess of "the benefit received. The case of Norwood vs. Baker, "172 U. S. 269, contains an elaborate discussion of the "subject, with a citation of authorities from many of the "States, and holds that a local assessment for an amount "in substantial excess of the benefit received is in violation "of the Fourteenth Amendment of the Constitution of "the United States, inasmuch as it would deprive one of "his property without compensation, and so without due "process of law. The authority of this case is controlling

"in all State courts, and *if it were not*, it is *in accordance* "*with sound principle*, and with the great weight of "authority in other courts." (p. 78.)

In Hutchison vs. Storrie, 92 Texas, 685, the Supreme Court of Texas, after stating the principle decided in Norwood vs. Baker, says:

"We recognize the binding force of the decisions of "the Supreme Court of the United States upon this ques- "tion, but *we the more readily apply it, because we endorse* "*it as a timely and just announcement of the superiority* "*of a constitutional guaranty over a rule of law established* "*by the courts.*" (p. 691.)

The Supreme Court of Ohio in Schroder vs. Overman, 61 Ohio St. 1, 47 L. R. A. 156, fully recognized the effect and the justice of the principle settled by Norwood vs. Baker, but pointed out that in that case the court had determined, upon the trial, that the benefit in fact exceeded the amount of the assessment; and in that connection said:

"Undoubtedly, as has been held by this court again and "again, the principle which permits the assessments of "the cost of local improvements upon abutting and con- "tiguous lands is that such property receives benefits "beyond that common to the public at large, and the *con-* "*clusion would naturally follow*, and does follow, that *such* "*assessment can in no case, save by express consent of* "*the owner, lawfully exceed such benefit.* It follows, "further, that any system which results in imposing such "assessments without respect to benefits must be vicious "and unsound. But we are dealing with a case where the "court has determined upon a trial that the benefit *in* "*fact* exceeds the amount of the assessment, and yet where

"the plaintiff asks the interposition of a court of equity to "prevent the commission of an alleged wrong upon her "property." (p. 13.)

In Kersten vs. City of Milwaukee, 106 Wis. 200; 48 L. R. A. 851, a Board of Public Works claimed to have viewed the premises, and to have based an assessment upon their judgment of cost and benefit; but the court disregarded the same upon the proof in the case to the effect that the conclusion of the board was *palpably not justified by the facts*, and on that subject the court said:

"It is not enough for the board to say that they viewed "the premises, and exercised their judgment, if the facts "negative that assertion. Here *the facts cry out so loudly* "*against the conclusion reached that we find no difficulty* "*in agreeing with the court's estimate of the board's pro-* "*cedure.*" (p. 204.)

Accordingly the court held that all proceedings should be stayed until there should be a reassessment of damages and benefits.

In the late case of Smith vs. Worcester, 182 Mass. 232, decided after the decisions in both Norwood vs. Baker and French vs. Barber Asphalt Paving Co., the Supreme Court of Massachusetts, speaking through Chief Justice Holmes, said:

"Under the recent decisions it may be true that when "the legislature is passing a *law of general future appli-* "*cation*, and when, therefore, it can not be supposed to "have compared the local benefit with the cost, the only "mode in which it can be made certain, apart from the "police power, that *constitutional rights* are preserved is by "limiting each assessment upon an estate to the benefit "received by that estate. But when the legislature has

"contemplated *a certain region*, and may be supposed to "have acted in view of a *specific scheme*, there is no doubt "that within reasonable limits it may determine that the "cost of improvement shall fall upon a *designated district*, "and may fix the principles upon which the cost shall be "apportioned." (p. 234; our italics.)

We think we may appropriately conclude our reference to authorities on this general subject by another quotation from the language of Judge Dillon in his work on Municipal Corporations, in which, in speaking of this subject and the conflict in authority, he says:

"Whether it is competent for the legislature to declare "that no part of the expense of a local improvement of a "public nature shall be borne by a general tax, and that "the whole of it shall be assessed upon the abutting prop- "erty and other property in the vicinity of the improve- "ments, thus for itself conclusively determining, not only "that such property is specially benefited, but that it is "thus benefited to the extent of the cost of the improve- "ment, and then to provide for the apportionment of the "amount by an estimate to be made by designated boards "or officers, or by frontage or superficial area, is a question "upon which the courts are not agreed. Almost all of "the earlier cases asserted that the legislative discretion "in the apportionment of public burdens extended thus "far, and such legislation is still upheld in most of the "States. But since the period when express provisions "have been made in many of the State Constitutions "requiring uniformity and equality of taxation, several "courts of great respectability, either by force of this "requirement or in the spirit of it, and perceiving that "special benefits actually received by each parcel of con-

"tributing property *was the only principle upon which* "*such assessments can justly rest*, and that any other rule "is unequal, oppressive and arbitrary, have denied the "unlimited scope of legislative discretion and power, and "asserted *what must, upon principle, be regarded as the* "*just and reasonable doctrine, that the cost of a local* "*improvement can be assessed upon particular property* "*only to the extent that it is specially and peculiarly bene-* "*fited; and, since the excess beyond that is a benefit to the* "*municipality at large, it must be borne by the general* "*treasury.*" (2 Dillon on Municipal Corporations, 4th edition, page 935, Section 761.)

Whatever may be the result of the application of the principle to a particular case, it does seem to us that the authorities cited establish *the principle* that the *only constitutional basis* for taxation in the form of *special assessments* upon selected property is *special benefit* to that property, accruing from the work for which the assessment is made.

Before considering the general subject of relief against the violation of this principle, as applicable to property in general, we desire to call the court's attention to specific adjudications which have been made by courts of high character upon the subject of its application to the peculiar kind of property involved in the case at bar, to wit, *railroad rights of way.*

II.

Special Assessments Against Railroad Rights of Way.

Whatever may be the true rule as to property in general, the property involved in the case at bar is peculiar; it belongs to a class by itself; it is a *railroad right of way*. It is one kind of property which certainly is not benefited, and can not be benefited, by the improvement of a highway running either across it or parallel to it. The question is not as to whether the railroad *company* which owns this section of a right of way is benefited by the construction or improvement of streets running into or through the city; for all the inhabitants of the city, all persons who do business in the city, the railroad company included, are benefited by anything which benefits the city, and increases its commerce. But while such general benefits justify general taxation, they do not justify special taxation, assessed upon specific pieces of property, selected out of the great bulk of the property in the city. The benefits which justify special assessments, for the purpose of paying for local improvements, must be benefits special or peculiar to *the property which is specially taxed*. Therefore we say that, while the construction or improvement of a highway which runs across or parallel with a portion of a railroad right of way may benefit the railroad *company*, just as it benefits all other inhabitants of the city, yet it does not benefit that *particular section of the right of way*, which happens to be near the street thus improved.

We are not now considering the question of whether the construction or improvement of the street benefits property upon which the company's *depot* may be situated, or property occupied by its *yards*, but we are considering alone the question of benefit to a mere section of its *right of way*,

which is occupied solely by a portion of the roadbed of its main road, and the tracks thereon. And the peculiar nature of this property, and the peculiar use made of it, make it so absolutely plain that no benefit thereto can come from the improvement of an adjacent highway, over which persons travel in carriages or on foot, as to make the proposition indisputable, and one which a court, or the judge thereof, as a man of common knowledge and experience, must know to be true, even in the absence of allegation or proof.

In the case at bar it is alleged, and not denied, that on this narrow right of way, which is only 66 feet wide, the portion thereof involved in this case being nearly 1,800 feet long, there are no houses or buildings of any kind; that there is a double track railroad upon it; and, in the language of the answer, "it is used only, and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its roadbed, as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid." (R. 16.) And the great weight of modern authority, even before the case of Norwood vs. Baker was decided, was and is to the effect that property of this kind can not be assessed with any part of the cost of improving a street, *because it is one class of property concerning which it is not possible to indulge the presumption that it is benefited by such an improvement.*

One of the strongest cases on this subject is Allegheny City vs. West Pennsylvania Railroad Co., 138 Pa. St. 375. This is a peculiarly strong case, because the general rule in Pennsylvania, as recognized in that case, is that the owner of an ordinary piece of property can not defend against a local assessment on the idea that his property is not benefited. The opinion in this case is so strong and so directly applicable to the case at bar, and has been so often cited and quoted

since, that we feel justified in making quite an extensive quotation from the language of the court. It says:

"The constitutionality of assessments for street improvements can be sustained only upon the ground that the "property assessed is benefited by the improvement. This "is the doctrine of all the authorities. It is sufficient to "refer to Hammett vs. City of Philadelphia, 65 Pa. St. 150.

"It is true, as a general rule, the property owner can "not defend that his property is not benefited by the "improvement. Michener vs. City of Philadelphia, 118 "Pa. St. 535; Commonwealth vs. Woods, 44 Pa. St. 113. "These cases, however, and the reasoning by which they "are supported, have no application to the roadbed of a "railroad company. *This is the one species of property "which, it is conceded, can derive no possible benefit from "street improvements.* As was said in Philadelphia vs. "Railroad Company, *supra* (88 Pa. St. 424), 'a railroad can "not, from its very nature, derive any benefit from the "paving, while all the rest of the neighborhood *may.*' "The owner of an ordinary lot of ground, whether such "owner be an individual or a railroad corporation, can "not be heard to defend against a municipal assessment "for paving, for the reason that the *law presumes* such "property is benefited. But, in the case of the roadbed "of a railroad, the presumption of law is the other way. "It is the same at all times and under all circumstances; "herein *the law declares the absence of benefits.*

"It was urged, however, that the liability of a railroad "company for municipal assessments was decided by this "court in Western Pennsylvania R. Co. vs. Allegheny, 2 "W. N. 229. That case does not rule this, however. A "railroad company may be liable for some municipal

"assessments. We have just decided in Mt. Pleasant Bor. "vs. Railroad Co. (138 Pa. St. 365), as has been already "stated, that a passenger depot, freight depot, and lumber "yard were so liable. But neither of the above cases "nor any other case to which my attention has been called "has ever held that such a lien may be filed against the "roadbed. It was urged, however, that it is *within the "power* of the legislature to subject it to such claims, and "that the act of 1870 has done so in the city of Alle- "gheny. We are not discussing the power of that body "to impose *general taxation.* It is admittedly very great, "and, as observed in Fox's Appeal, 112 Pa. St. 337, "'within the limits of the Constitution it is bounded only "by the necessities of the State and the will of the peo- "ple.' We are dealing with the case of *special, local* tax- "ation; of the right of municipal authorities to levy a "tax upon A, which it does not impose upon B, for the "reason that it has done something by which the property "of A has been specially benefited to the amount of the "tax. In the absence of any such benefit, in a case "where we can declare as a matter of law no such benefit "can arise, the legislature is powerless to impose such a "burden. It would not be a tax in any proper sense of "the term: it would be in the nature of a forced loan, "and *would practically amount to confiscation.*" (pp. 382, 383.)

The same conclusion was reached by the Supreme Court of Wisconsin in Chicago, M. & St. P. R. Co. vs. Milwaukee, 89 Wis. 506. Here the court follows the reasoning and cites a number of the decisions of the Supreme Court of Pennsylvania, including the one just quoted from, and, among other things, says:

"It is universally conceded that all such assessments

"(special assessments) have their foundation, rest upon, "and can not lawfully exceed, the special benefits of the "improvement to the property against which the cost of "its construction to that extent is charged. (Citing author- "ity.) Such an assessment can not be maintained for "general benefits to the community or locality resulting "from the work. For the payment of such expenditures "resort must be had to *general* taxation, the rule of which "is required to be uniform. * * * We think it "clear, *as a matter of law*, that property such as the rail- "road tracks and necessary right of way can not be said "to be benefited by the improvement in question. "* * * In Junction R. Co. vs. Philadelphia, 88 "Pa. St. 424, it was held that the city could not maintain "a municipal claim for paving against or opposite the "roadbed of a railroad company, and that it was *immate- "rial whether the company had simply a right of way or "owned the bed in fee.* * * *

"It was contended that the assessment of the Board "of Public Works is conclusive that the entire strip in "question, *including the track and necessary right of way*, "was benefited by grading and paving of Commerce "Street; and that the only question open to the appellant "was as to the amount of benefits. (Citing the cases "relied on.) The question of benefits to the track and "right of way being a legal one, manifestly the assess- "ment can not be conclusive, but the position is no doubt "correct as to the rest of the strip. This precise question "was presented in Allegheny City vs. West. Pennsylvania "Railroad Co., 138 Pa. State, 382, where it was held that," etc. (Quoting part of the language hereinbefore quoted in this brief.) (pp. 515, 516, 517.)

In Detroit, etc., R. Co. vs. City of Grand Rapids, 106 Mich. 13, which involved a local assessment upon the railroad right of way, the court said:

"The right of way so assessed contains the main track "and one sidetrack. It has nothing else upon it, and is "used for no other purpose. It has already been dedi- "cated to a public use, and the question is presented "whether a railroad right of way can be assessed by "municipal corporations for public improvements. So "far from being any benefit, it is established by the evi- "dence that the opening and paving of the street were a "damage to the complainant. *A right of way can not be "benefited by the opening and paving of a street upon it.* "None of the buildings of the complainant are within "two blocks of this crossing. We can see no benefits, "immediate or prospective, to the complainant. The "division of the right of way into three parcels was "*arbitrary, as were also the valuations and supposed ben- "efits.* The point is so clearly and concisely stated by "the Supreme Court of Pennsylvania that we quote the "opinion in City of Philadelphia vs. Railroad Co., 33 Pa. "St. 43." (Here quoting.)

In New Jersey R. R. Co. vs. City of Elizabeth, 37 N. J. Law, 330, there were involved two assessments against a railroad right of way, one for improving a street which crossed it, and the other for improving a sewer near it. The court held that there was no benefit from either improvement, and hence that the assessments could not be upheld. On the subject of the street improvement it said:

"Nor can this assessment be supported on the other "ground of benefits conferred in the advantage derived

"in the improvement of the company's lands for the uses "to which they are appropriated. The proof is that the "paving laid on the crossing of the street over the rail- "road track is an injury, rather than a benefit, to the "company, and occasions increased expenses in keeping "the track in repair. The case in this respect is within "the decision of this court in State, the M. & E. R. R. "Co. Pros. vs. Jersey City, 7 Vroom. 56; and the assess- "ments for paving must be set aside." (p. 333.)

Then, as to the sewer assessment, the court said:

"There is nothing in the purpose for which the com- "pany was incorporated, or the use to which the land was "appropriated, that will invalidate the assessment; it "must, therefore, be affirmed, unless its imposition, in this "case is a violation of the principles laid down in the "Tidewater case (3 C. E. Green, 519), that an assessment "of an individual owner towards defraying the cost of a "local improvement, must be founded on some peculiar "benefit derived by him from its construction over and "above that of the public, and that the amount which he "may lawfully be required to contribute to that end is "limited to the *quantum* of benefit he receives." (p. 333.)

The opinion of the Supreme Court of Iowa in Chicago, etc., R'y Co. vs. Ottumwa, 112 Iowa, 300, is quite pertinent to the present consideration, though possibly it can not be cited as an absolute adjudication of the question, for the case was really decided upon a question of construction of the statute, although, as will be seen from the opinion, this construction was induced mainly by the consideration that a *railroad right of way is not benefited* by the paving of a street, and therefore could not be assumed to have been

within the legislative intent in providing for local assessment to pay for the cost of such improvement. The court says:

"We may well assume that the legislature, in passing "the acts in question, did not intend that railway rights of "way should be assessed for paving and curbing, for the "reason that such rights, used solely for the laying of "tracks, would not, as a general rule, be benefited in any "manner whatever by the paving or curbing, and if any "argument were needed to enforce this thought, it is to be "found in the facts of this case, which show that it was "of no benefit whatever to the right of way. A different "question arises where the property is used for depot "grounds and other like purposes. On that point we "express no opinion, for it does not arise in the instant "case. (p. 310.) * * *

"Again, it is said that no benefits resulted to the right "of way, or to the corporation owning or occupying the "same, and that for this reason the assessment was *invalid.* "If that were the only question in the case, *we would be* "*inclined to hold with appellant's contention that, as there* "*was no benefit whatsoever, the assessment was, for that* "*reason alone, invalid.* There are, of course, some objec- "tions to this conclusion, and it is best perhaps that we "express no decided conviction on the subject, for it seems "to be held by courts of high authority that the legis- "lature has power to authorize the assessment of railway "rights of way for local improvements. *In re* County "Commissioner of Hampshire County, 143 Mass. 424. "That question is also left open for further consideration "when it properly arises." (p. 313.)

An examination of the Massachusetts case here referred to by the Supreme Court of Iowa shows that the improve-

ment involved in the Massachusetts case was not a street improvement, but was the improvement of a bank of the Connecticut River near which ran the right of way of the railroad, so that the protection of the bank of the river operated as a protection, and consequent benefit, to the railroad right of way. In fact that does not seem to have been disputed in the case, and there was no question of constitutional power involved in it.

On the question of fact as to whether or not railroad property is benefited by the improvement of a street near it, the Supreme Court of Connecticut seems to have gone to an extreme length in the case of New York, etc., R. Co. vs. City of New Haven, 42 Conn. 279, in which it was held that there is no special benefit even to the *depot property* of a railroad company by the improvement of a street approaching the same. But it is not necessary for the purposes of the present case that the correctness of this conclusion should be determined.

Now, as against this array of authorities, most of which are quite modern, counsel for the defendant in error rely upon two cases, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, and Peru, etc., R. Co. vs. Hanna, 68 Ind. 567.

In the first of these two cases, to wit, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, in dealing with this question of the right to assess a railroad right of way for the improvement of a street, the court says:

"But it is said that assessments, as distinguished from "general taxation, rest solely upon the idea of equivalents, "a compensation proportioned to the special benefits "derived from the improvements, and that in the case at "bar the railroad company is not, and in the nature of "things can not be, in any degree benefited by the

"improvement. It is quite true that the right to impose "such special taxes is based upon a *presumed* equivalent; "but it by no means follows that there must be *in fact* "such full equivalent in every instance, or that its "absence will render the assessment invalid. * * * "*The mode adopted by the council becomes the statutory* "*equivalent for the benefits conferred, although in fact the* "*burthen imposed may greatly preponderate.* In such "cases, if no fraud intervene, and the assessment does not "substantially exhaust the owner's interest in the land, "his remedy would seem to be to procure, by a timely "appeal to the city authorities, a reduction of the special "assessment and its imposition, in whole or in part, upon "the public at large." (p. 165.)

As to the last suggestion, that a party's remedy is to appeal to the city authorities to reduce his assessment and impose the burden upon the public at large, this can not apply to an assessment made under the law of Kentucky, for no such appeal would be, or could be, heard under the Kentucky law. The council has no discretion in the matter.

The language of the Supreme Court of Ohio in the case just quoted seems to us to be in effect the language of absolutism. To the citizen who insists that his property can not be taken without compensation, and that the particular improvement in question is of no benefit to him, and therefore no compensation for the burden imposed, and that there is no reason why his property should be singled out from the mass of property in the city and required to pay the cost of this public improvement, and that the Constitution gives him a right to an equivalent for his property taken, the court says: "Yes, you are right about this; you are entitled to compensation; the legislature can not take your property, even for

public use, without an equivalent to you, the Constitution so provides; *BUT* that is a mere *fiction* of the law; although *in fact* you received no equivalent, yet the law conclusively *presumes* you have received it, because the legislature and council have ordered your property to be taken; and '*the mode adopted by the council becomes the statutory equivalent for the benefits conferred.*' " This process of reasoning seems to us to make the claim of constitutional limitation upon the power of the legislature, and of constitutional protection to the rights of private property, a subject of ridicule. The most absolute despot that ever lived might, with equal force and truth, boast that his is a constitutional monarchy, while saying to a subject: "I want your house and lands, you are entitled to be paid for them; an order has been issued that you deliver them to me; that order is the 'equivalent' for your property. You are *presumed* to have been compensated."

In the other case relied on, to wit, Peru, etc., R. Co. vs. Hanna, 68 Ind. 567, the court, without attempting to reason upon the subject, disposes of it in the following two short sentences, to wit:

> "The first point made by appellant's counsel is that the "strip of ground in controversy is not assessable for street "improvement, because the railroad track is itself a public "highway. We can not concur in this view, but are of "opinion that the track of a railroad company, when it "borders on a street, is properly assessable for its due pro- "portion of the cost of the improvement of such street "under an ordinance of the city. City of Chicago vs. "Baer, 41 Ill. 306; Northern Indiana R. R. Co. vs. Con- "nelly, 10 Ohio St. 159; Burlington, etc., R. Co. vs. "Spearman, 12 Iowa, 112." (p. 567.)

Now, of the three authorities thus cited by the Supreme Court of Indiana in support of this proposition, two of them, to wit, the cases in 41 Illinois and 12 Iowa, have absolutely no application to the question under consideration, because in each of them it was conceded that the property in question *was benefited* by the improvement made. In the Iowa case the property was a railroad *depot;* and while the Supreme Court of Iowa held that this was assessable, we know from the authority heretofore cited that, as to a railroad *right of way*, the Supreme Court of Iowa holds that it is not benefited by a street improvement, and is not assessable. (Chicago, etc., R. Co. vs. City of Ottumwa, 112 Iowa, 300, 309.) And in the Illinois case, City of Chicago vs. Baer, 41 Ill. 306, the property involved was a street railway, in the street improved, and the court in its opinion expressly says that no one denies that the property is in fact benefited, that the fact of actual benefit to the property is something which *no one would controvert.* The only other authority cited by the Indiana court for its very brief statement on the subject is the case, just considered, of Northern Indiana R. Co. vs. Connelly, 10 Ohio St. 159.

We find that a decision by this court, to wit, Illinois Central Railroad Co. vs. City of Decatur, 147 U. S. 190, is sometimes cited as a decision to the effect that a railroad right of way is benefited by the improvement of a street, and that to assess the right of way with that part of the cost of such improvement does not deprive the company of its property without due process of law. As a matter of fact, however, no such question was involved in that case. The case was one which arose in a State court in Illinois and came to this court by writ of error to the Supreme Court of Illinois. Of course, it came here only on a *Federal question*, and only upon such Federal question as was *raised by the record.* And

the only Federal question raised by the record was a question of *contract*. The railroad company in its charter had a provision to the effect that, upon the payment of certain taxes, it should be exempt from *all other taxation;* and it was insisted that this exemption covered *special assessments* for local improvements, as being a form of taxation; and therefore, that the attempt to tax the property of the railroad company for a street improvement was a *violation of the charter contract*. The railroad company did not make the question that to tax the property for a local improvement, when there was no local benefit, was a deprivation of property *without due process of law*. That the question in the case was the one we have stated, to wit, the question of contract, and not a question of due process of law, is shown by the opening sentence in Mr. Justice Brewer's opinion, which is as follows, to wit:

> "*The single question in this case is*, whether this special "tax for the local improvement *is within the exemption* "*from taxation granted to the railroad company by Sec-* "*tion 22 of the act of 1851*." (p. 197.)

The court then proceeds to examine into the question of the nature of general taxation and special taxation, and to show that, while a special tax is, in its proper sense, *a tax*, yet it was manifestly not the character of tax that was referred to by the terms used in the charter contract, and therefore that there was no violation of that contract. And when the court, in the last paragraph of its opinion (p. 208), uses language to the effect that the company did not, by its charter, have any contract as to whether the question of local benefits should be determined by a *jury* or by a *council*, it was still considering the question of the *construction of that charter contract*, and was referring to the fact, which is a fact in Illi-

nois judicial history (as shown by the opinion of the court in White vs. the People, 94 Ill. 504), that there had grown up in the State of Illinois two different procedures for paying the cost of local improvements, to wit, one called generally a "special tax," and the other a "special assessment," in one of which *the council* passed on the question of benefits, and in the other of which a *jury* passed on the question. And all the court meant by the language of the last paragraph of the opinion is that the railroad company had no *contract* with the State of Illinois as to how the question of special benefits should be determined. The question involved in the case at bar as to the power to impose a special tax upon property for a local improvement, based on the pretense of local benefit, when there had, in fact, been no local benefit, was not involved in that case, as the opening sentence of the opinion above quoted shows.

The court may find a number of *street railway* cases cited, in which it has been held that a street railway *lying in the street improved* may be assessed for an improvement of the street. But it is manifest that an improvement of the street in which the street railway lies is a benefit to the street railway; and in the cases upon that subject this consideration is brought forth. Thus City of New Haven vs. Fair Haven R. Co., 38 Conn. 422, is sometimes cited; but that was a case of a *street railway*, and the court said, as a matter of fact, that the defendant was *unquestionably benefited* by the improvement. Again, the case of the Appeal of North Beach R'y Co., 32 Cal. 499, is sometimes cited. This also was a street railway; and the court held as a *conclusion of fact* that there could be no doubt that the property of the street railway company was benefited by the widening and improvement of the street involved. On that subject it said: "The more people traveling and frequenting Kearney Street,

the greater the number likely to ride in the company's cars, and the greater its profits are likely to be." (32 Cal. 514.) Manifestly, these street railway cases have no bearing whatever upon the question involved in the case at bar.

It seems to us it must be evident to any thinking person, and would be evident in the absence of allegation or proof, that a *mere section of the right of way of a railroad*, whether the title be technically an easement or a fee, upon which are only the roadbed and the tracks of the company, is *not benefited to the slightest degree by the opening or the paving of a street, crossing the same or running parallel with it;* but that, on the contrary, as alleged in the answer in the case at bar, the improvement of such a street, or anything which induces additional passage over it, running across the railroad or immediately adjacent to it, is an injury rather than a benefit. And it seems to us to be simply a mockery to say that, while this is true, yet the court will *presume the contrary to be true*, in order to meet the constitutional requirement that the property of the citizen shall not be taken, even for a public purpose, without just compensation.

III.

Relief Against Unconstitutional Acts.

If it be true, as we think we have shown is the case, that the only constitutional basis for taxation in the form of special assessments upon selected property is special benefits to that property, resulting from the work for which the assessment is made; in other words, if it is contrary to the Constitution to impose upon particular property a special assessment for the doing of a work from which that property receives no benefit, and if, nevertheless, the legislature of a State enacts a statute under which this very thing is directed to be

done, can the courts of the country give no relief against this violation of the Constitution? We do not refer to the case where either the legislature of the State or a municipal council, acting under authority of a legislative act, has had in contemplation a particular situation, and has determined in view of the facts how a certain improvement shall be made, and what property has been or will be benefited thereby. We refer to a case where the legislature of the State, looking to all future time, and without having in mind any particular situation, simply passes a general law and prescribes that in the future the cost of making all streets in all cities of the first class in the State shall be assessed upon all the property lying between that street and a line drawn halfway between it and the next parallel street on each side thereof, without regard to what the situation in any particular case may be, and even though it may be apparent that some property thus included receives not the slightest benefit from the making of the street, as is true in the case at bar. The contention that the legislature is thus omnipotent, and that there is no power to relieve the citizen against this manifest violation of a constitutional right, seems to us to recall the language of this court speaking through Chief Justice Marshall in Marbury vs. Madison, 1 Cranch, 176, as follows, to wit:

"The question, whether an act repugnant to the Con-
"stitution can become the law of the land, is a question
"deeply interesting to the United States; but, happily,
"not of an intricacy proportioned to its interest. It
"seems only necessary to recognize certain principles,
"supposed to have been long and well established, to
"decide it.

"That the people have an original right to establish,
"for their future government, such principles as, in their

"opinion, shall most conduce to their own happiness, is "the basis on which the whole American fabric has been "erected. The exercise of this original right is a very "great exertion; nor can it, nor ought it, to be frequently "repeated. The principles, therefore, so established, are "deemed fundamental. And as the authority from which "they proceed is supreme, and can seldom act, they are "designed to be permanent.

"This original and supreme will organizes the govern- "ment, and assigns to different departments their respect- "ive powers. It may either stop here, or establish *certain* "*limits not to be transcended by those departments.*

"The government of the United States is of the latter "description. The powers of the legislature are defined "and limited; and that those limits may not be mistaken, "or forgotten, the Constitution is written. *To what pur-* "*pose are powers limited, and to what purpose is that lim-* "*itation committed to writing, if these limits may, at any* "*time, be passed by those intended to be restrained?* The "distinction between a government with limited and "unlimited powers is abolished if those limits do not "confine the persons on whom they are imposed, and if "acts prohibited and acts allowed are of equal obligation. "It is a proposition too plain to be contested that the "Constitution controls any legislative act repugnant to it; "or, that the legislature may alter the Constitution by an "ordinary act.

"Between these alternatives there is no middle ground. "The Constitution is either a superior paramount law, "unchangeable by ordinary means, or it is on a level "with ordinary legislative acts, and, like other acts, is "alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a

"legislative act contrary to the Constitution is not law; "if the latter part be true, then written Constitutions are "absurd attempts, on the part of the people, to limit a "power in its own nature illimitable.

"Certainly all those who have framed written Constitu- "tions contemplate them as forming the fundamental and "paramount law of the nation, and, consequently, the "theory of every such government must be that an act of "the legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Con- "stitution, and is consequently to be considered, by this "court as one of the fundamental principles of our society. "It is not, therefore, to be lost sight of in the further con- "sideration of this subject."

Of what possible benefit is it to the citizen that the Constitution provides that he shall not be deprived of his property without due process of law, that his property shall not be taken from him, even for a public purpose, without just compensation, if the legislature has nevertheless the absolute power to say that his property shall be taken from him, even though he has received no compensation? Yet that power is what is contended for, and must be upheld, if the judgment in this case is affirmed.

We do not contend that a statute of the character in question is void *in toto*, and as to *all property*. All we contend for is that, if this particular property is, in fact, not benefited by the making of this street, then to take that property, or to take $3,176.72 worth of it, to pay for the making of that street, is to take, to that extent, the property of its owner for public use without any compensation. It may be that the true rule is that which the Supreme Court of Oregon, in King vs. Portland, quoted afterwards by this court, said was deducible from the adjudged cases, viz., that the assessment

will be upheld wherever it is not patent and obvious from the entire situation that "the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits." (184 U. S. 69.) All we contend for is that the owner of this property must be permitted to show, if he can, that this general rule, adopted long years before the particular work in question was done, and without any special reference to that particular work, when applied to this particular case, "has resulted in imposing a burden in substantial excess of the benefits." That it does thus result is conceded in the case at bar; and the defendant in error contends for the bald proposition that there is no help for it.

It will not do to say that the legislature *has determined* as a matter of fact that the right of way of the Louisville & Nashville Railroad Company adjacent to Frankfort Avenue *has been benefited* to the extent of the amount of this assessment, to wit, $3,176.72. That is simply *not true;* and this court knows, on the face of this record and on the face of the statutes and ordinances involved, that it is not true. *There has been no such determination by the legislature, or by any other tribunal.* There has been no consideration of that question by any tribunal whatever. As we have heretofore shown, the legislative act involved is simply a *general rule applicable to all cases that may arise in the future, without any reference to the particular facts of any situation, or to the peculiar character or nature or value of any particular property or public improvement.* It is *a law, a rule,* as distinguished from *a decision.* And the apportionment involved in the case at bar against this right of way of the Louisville & Nashville Railroad Company is simply the result of the application of that law which the legislature, years before this improvement was ever undertaken, declared should be applied *to all cases, without regard to the individual facts of any case.*

It is true, as we have heretofore mentioned, that the statute contains a provision that the court in which any suit may be pending "shall make all corrections, rules and orders to do justice to all parties concerned"; yet, as heretofore explained, the courts of Kentucky have construed this as not permitting any person whose property is thus assessed to show that the cost assessed against his property is in substantial excess of the benefit accruing thereto, unless he can show that the cost thus assessed is absolutely equal to the value of his property, so as to "entirely" take from the citizen his property. The courts of Kentucky have construed this provision as to corrections as simply giving the power to make, for example, such a correction as was made in the case at bar, when the court determined that the territory contiguous to the improvement was defined into squares, within the meaning of the law, and therefore that the assessment should extend halfway back to the next parallel street, instead of being limited to a depth of 195 feet, as prescribed by the ordinance under which the work was done.

We repeat that there has never been any determination by any tribunal, legislative or judicial, that the property here involved is benefited, or will be benefited, by the public work for which the cost of $3,176.72 is assessed against this property. That the property is not benefited by the improvement in question is admitted, and must be patent to any one. The property of the citizen is about to be taken from him for public use without any compensation whatever, simply because the legislature of the State in a general law, prescribing a rule for all future cases, has declared that it shall be done. And in conclusion we may ask, in the language of Chief Justice Marshall:

"To what purpose are powers limited, and to what pur-
"pose is that limitation committed to writing, if these

"limits may, at any time, be passed by those intended to "be restrained?"

We respectfully ask that the judgment of the Court of Appeals of Kentucky be reversed and the cause remanded with directions to dismiss the proceeding as against the right of way of the Louisville & Nashville Railroad Company.

Respecfully submitted,

HELM BRUCE,
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JAMES P. HELM,
T. K. HELM,
Of Counsel.

February 2, 1905.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows. The sections quoted are portions of an act of the Kentucky legislature entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed Kentucky Statutes:

PUBLIC WAYS.

Section 2832. *Public Ways, Improvements, Meaning of Terms.* Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. *Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien.* When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the *exclusive cost* of the owners of lots in each fourth of a square to be *equally* apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets,

the ordinance providing for the improvement of such public ways shall state the *depth* on both sides fronting said improvement to be assessed for the cost of making the same, *according to the number of square feet* owned by the parties respectively, within the depth, as set out in the ordinance. The General Council shall have power by ordinance, recommended by the Board of Public Works, to cause the digging and the walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square for the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the General Council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the Board of Public Works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid. (*Section as amended by Act of March 19, 1898, making radical changes in old section.*)

Section 2834. *Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance.* A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the General Council shall exempt from

payment after the work has been done as required by either the ordinance or contract; but the General Council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the General Council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. *Sidewalks and Curbing—Apportionment of Cost.* The cost of making sidewalks, including curbing, whether by original construction, or reconstruction, shall be apportioned to the front foot, as owned by the parties, respectively fronting said improvement except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. *Property Owners Permitted to Improve Public Ways.* The Board of Public Works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the Board of Public Works.

Section 2837. *Inspection and Reception of Work—Publication of Notice.* When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the Board of Public Works shall, by one insertion in one of the daily newspapers published

in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents and representatives may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. *Action to Enforce Lien—Evidence—Provision for Redemption.* In all actions to enforce liens, a copy of the ordinance authorizing the improvement or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be *prima facie* evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be *prima facie* evidence of every other fact necessary to be established by the plaintiff in such actions, to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent. per annum, and all the taxes and assessments on and against such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments, and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. *Apportionment Warrants—Registration—Lien.* The Board of Public Works shall make out all appor-

tionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphabetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the Board of Public Works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.

Supreme Court of the United States

OCTOBER TERM, 1903.

NO. 541.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, - }
THE CITY OF LOUISVILLE, - - } *Defendants in Error.*

Notice of Motion to Dismiss or Affirm.

The plaintiff in error, the Louisville & Nashville Railroad Company, and its counsel, James P. Helm, Esq., and Helm Bruce, Esq., will take notice that on Monday, November 28, 1904, in the court-room of the Supreme Court of the United States in the city of Washington, D. C., at or about the hour of twelve o'clock m., at the motion hour of the court, the defendants in error will move the court aforesaid to dismiss the writ of error in this cause for want of jurisdiction in the court, and will also move said court to affirm the judgment to which said writ of error purports to have been prosecuted on the ground that it is manifest that said writ of error was taken for delay only; and manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument. In support of said motions the defendants in error will file a brief, a copy of which accompanies this notice.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
HENRY L. STONE,
Counsel for Defendants in Error.

As counsel for plaintiff in error I acknowledge service of the within notice, and also acknowledge receipt of a copy of the motion referred to in said notice, and the further receipt of copy of brief in support of said motions.

HELM BRUCE,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

NO. 541.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, - }
THE CITY OF LOUISVILLE, - - } *Defendants in Error.*

Motion to Dismiss or Affirm.

Defendants in error come, and by their counsel appearing in their behalf, move the court to dismiss the writ of error in this case for want of jurisdiction in the court. As ground for said motion to dismiss it is represented to the Court that the judgment and decree from which the said writ of error purports to have been prosecuted is a judgment and decree of the Court of Appeals of one of the States of the United States, to-wit: Court of Appeals of Kentucky, and said judgment or decree is not founded or based on a federal question, and does not involve the constitutional provision requiring "due process of law," "the equal protection of the laws," or any federal question. Said judgment of the Court of Appeals of Kentucky involves only the question as to whether the property of the plaintiff in error is included within the statute of Kentucky providing for special taxation, and the construction placed on said statute of Kentucky is in accord with the established rule long prevalent in said State, and in no way presents a constitutional or federal question.

The judgment of the Court of Appeals from which the writ of error purports to have been prosecuted decides that the

statute of the State of Kentucky providing a general scheme for assessing the cost of public improvements is legal and constitutional as this Court had previously held in Walston vs. Nevin, 128 U. S., 578. Said judgment also decided that the property of the plaintiff in error was contemplated by and subject to the provisions of the Kentucky Statute aforesaid.

Defendants in error, by counsel, also move the Court to affirm the judgment of the Kentucky Court of Appeals aforesaid, for the reason that, although the record in the case may show that this Court has jurisdiction in the premises, yet it is manifest that the said question upon which the said writ of error is based is so frivolous as not to need an argument, said question having been decided by the Court of Appeals of Kentucky in conformity with the rulings of this Court on the same issue, and the repeated decisions of said Kentucky Court of Appeals. Accordingly it is manifest that the writ of error was prosecuted for delay only.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
HENRY L. STONE,

Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, THE CITY OF LOUISVILLE, - *Defendants in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendants in Error on Motion to Dismiss or Affirm.

STATEMENT OF CASE.

During the year 1900, the City of Louisville by proceedings, admittedly proper, improved Frankfort avenue, a public way of Louisville. The cost of constructing the street was assessed under section 2833 of the Kentucky Statutes against the property in all quarter squares abutting upon the improvement, each lot being required to pay according to the number of square feet contained therein. The full text of the several sections of the Kentucky Statutes providing a plan of special taxation for local improvements will be found in the appendix to this brief.

Within the territory liable to taxation for the cost of the improvement of Frankfort avenue was a strip of ground containing about 100,000 square feet upon which was located the

roadbed and tracks of the Louisville & Nashville Railroad Company, which owned and held the real estate as a perpetual right of way. The municipal authorities assessed the property of the railroad company and issued warrants to the Barber Asphalt Paving Company on an apportionment of the cost. The warrants remaining unpaid, the Barber Asphalt Company instituted suit to enforce collection.

The original answer of the railroad company set forth two defenses. (1.) That the railroad owned within the district liable to assessment only a perpetual right of way which the Kentucky Statutes do not require or permit to be taxed. (2) That the road's right of way was not benefited by the improvement, and any assessment in the absence of benefit would be a taking of its property without due process of law, and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. Record page 16.

The Circuit Court of Jefferson County, Kentucky, speaking through its Chancellor, held in an exhaustive opinion that the answer of the railroad company was not sufficient in law. Record pages 19-31. The decision of the Jefferson Circuit Court was based on the propositions that the perpetual right of way of the Louisville & Nashville Railroad Company was property such as might and should be taxed under the Kentucky Statutes for the cost of a local improvement, and further, that the Legislature of Kentucky, having designated the territory and property that might be benefited by the improvement of the street, such determination was conclusive upon owners and the Court.

The railroad company then filed an amended answer setting forth that the apportionment of the cost had been erroneously made, and the Jefferson Circuit Court sustained the contention. Thereupon, acting under authority conferred by the statutes to make all corrections required to do justice to all parties concerned, the Court, by its commissioner, reapportioned the cost of the improvement, and reduced the charge against the railroad company about $300. Judgment was afterwards rendered against the property of the railroad in

the sum of $3,176.72, and the property ordered sold to satisfy the lien of the contractor. (Record page 50.)

An appeal was prosecuted by the railroad company to the Court of Appeals of Kentucky, where the judgment of the lower court was affirmed. The Appellate Court held, as the Circuit Court had ruled, that the provisions of the assessment laws of Kentucky included such property as the railroad company owned, and that the perpetual right of way was liable for its proper proportion of the cost of constructing Frankfort avenue. The Appellate Court also sustained the Circuit Court in the opinion that the legislative determination of benefits under the statutes of Kentucky was conclusive on owner and court and in no way violated the provisions of the Fourteenth Amendment. (Record pages 68-70.)

A writ of error to review the decision of the Kentucky Court of Appeals was allowed by this Court, and the defendant in error is now here moving that the writ be dismissed for want of jurisdiction or the case affirmed as a delay case.

ARGUMENT.

I.

If any question is apparently settled in this Court it is that attempted to be presented by plaintiff in error in its attack upon the constitutionality of the Statutes of Kentucky providing a plan of assessing the cost of local improvements. In French vs. Barber Asphalt Paving Company, 181 U. S., 324, this Court decided, as it had previously held in many cases, that the scheme of special assessment in vogue in Kentucky was not repugnant to any provision of the federal constitution.

More important on this submission is the fact that this Court has had under review the identical statute and same issue as here presented, and decided that the Kentucky legislature had acted within its constitutional power in the enactment of the assessment laws of the State. See Walston vs. Nevin, 128 U. S., 578.

If then it requires no argument in support of the constitu-

tionality of the statutes under which this case arose, the only remaining contention on the part of the plaintiff in error is to the effect that its perpetual right of way is not such property as was contemplated by the assessment laws of Kentucky. This question seems to have no aspect justifying an appeal to this Court. The decision of the Court of Appeals of Kentucky holding that the property of the Louisville & Nashville Railroad Company was within the provision and subject to the burdens of the Kentucky tax laws was based in no way on a federal question. It was nothing more than a construction by the supreme court of Kentucky of a statute of the State.

II.

In Walston vs. Nevin, 128 U. S. 578, this Court, under a writ of error to the Kentucky Court of Appeals, was called upon to consider the application of the Fourteenth Amendment of the Constitution of the United States to the Statutes of Kentucky governing special assessments. The statute quoted by Mr. Chief Justice Fuller in his opinion will be found upon examination to be the same statute as here on review. (See appendix.) After a reference to the Kentucky authorities construing the statute and the case of Davidson vs. New Orleans, 96 U. S. 97, this Court said:

"The conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constituton. So the determination of the taxing district and the manner of apportionment are all within the legislative power. Spencer vs. Merchant, 125 U. S. 345; Stanley vs. Supervisors, 121 U. S. 535, 550; Mobile vs. Kimball, 102 U. S., 691; Hagar vs. Reclamation District No. 108, 111 U. S., 701; United States vs. Memphis, 97 U. S., 284; Laramie County vs. Albany County, 92 U. S.,

307. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. Wurts vs. Hoagland, 114 U. S., 606; Railroad Company vs. Richmond, 96 U. S., 521, 529. The remedy for abuse is in the State Courts, for, in the language of Mr. Justice Field, in Mobile vs. Kimball, 'this Court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation.'

"As the question raised in these cases is a Federal question (Spencer vs. Merchant, supra), we will not sustain the motions to dismiss; but as there was, in our judgment, color for those motions, and the contention now made has often been pressed upon our attention before, and as often determined adversely, so that the rule must be regarded as settled, we shall grant the motions to affirm."

Several of the many cases and quotations approved in French vs. Barber Asphalt Paving Company, 181 U. S., 324, are here reproduced:

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review.

"The question of special benefit and the property to which it extends is of necessity a question of fact, and when the Legislature determines it in a case within its general power its decision must of course be final. * * * In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden, and having the power we cannot criticise the reasons or manner of its action." Opinion of the Court of Appeals in Spencer vs. Merchant, approved by this Court.

"The Legislature has the power to determine, by the statute imposing the tax, what lands, which might be ben-

fited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited." Spencer vs. Merchant, 125 U. S., 345.

"It has been held in this Court that the Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

"Unless the Legislature decides the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken." Walston vs. Nevin, 128 U. S., 578.

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area or market value of the lands or in proportion to the benefits as estimated by the commissioners. Bauman vs. Ross, 167 U. S., 548."

"The question thus raised has been so often and so carefully discussed both in the decisions of this Court and of the State Courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing powers. * * * Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States. Here the Court has decided that the proceeding below was in accordance with

the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States. * * * What was complained of was an orderly procedure under a scheme of local improvements prescribed by the Legislature and approved by the Courts of the State as consistent with constitutional principles. The judgment of the Supreme Court of Missouri is affirmed." French vs. Barber Asphalt Paving Co.

The plan of assessment attacked in the instant case has uniformly been sustained as constitutional by the Court of last resort in Kentucky.

McFerren vs. Alloway, 14 Bush, 580.
Ludlow vs. Railroad Co., 78 Ky., 573.
Purdy vs. Drake, 17 Ky. L. R., 819.
Allen vs. Wood, 20 Ky. L. R., 860.
Bullitt vs. Selvage, 20 Ky. L. R., 599.
Preston vs. Rudd, 84 Ky., 156.
Barfield vs. Gleason, 111 Ky., 291.

The procedure and rules approved by the courts of Kentucky do not tolerate any such abuses as Mr. Justice Harlan fears in his dissenting opinion in French vs. Barber Asphalt Paving Company. The settled law of the State does not permit of spoliation, and no assessment is sanctioned where the "cost equals or exceeds the value of the property specially taxed." See opinion of the Court of Appeals, record page 68.

This feature of the Kentucky law is emphasized in the latest announcement on the subject. Bitzer vs. Fulton, 24 Ky. L. R., 2263; 73 S. W. Rep., 1115.

"The method of assessment by the foot has been followed so long and has been so often approved by this Court that it no longer remains an open question. (Preston vs. Roberts, 75 Ky., 570; Nevin vs. Roach, 86 Ky., 492.) The rule also is that while these assessments rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown, the judgment of the City Council being conclusive as to the propriety of the improvement. (Pearson vs. Zabel, 78 Ky., 174; Ludlow vs. Trustees, 78 Ky., 360; Preston vs. Rudd, 84

Ky., 156; Covington vs. Schultz, 16 Ky. L. R., 831; Allen vs. Wood, 20 Ky. L. R., 61; Bullitt vs. Selvage, 20 Ky. L. R., 599.) On the other hand, it is held that when owing to extraordinary facts the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. (Covington vs. Southgate, 54 Ky., 491; Louisville vs. Rolling Mill Co., 66 Ky., 416; Broadway Baptist Church vs. McAfee, 71 Ky., 508; Preston vs. Rudd, 84 Ky., 150; France vs. Jacob, 88 Ky., 532; James vs. Louisville, 19 Ky. L. R., 447.)"

III.

The contention of counsel for plaintiff in error that the perpetual right of way of the railroad is not property to be taxed under the Kentucky law of special assessments, does not seem to present a question determinable in this Court. As said before, the decision of the Court of Appeals of Kentucky respecting this phase of the litigation did nothing more than place a construction upon the Statute of Kentucky in defining what was meant by the terms "lot," "property" and "square feet owned," as used in the provisions governing local improvements.

Such construction will be adopted by this Court if the Legislature might rightfully have done what the interpretation of the State Court says it did.

Commercial Bank vs. Buckingham, 5th How., 326.

Murray vs. Gibson, 15 How., 423.

Guthrie on Fourteenth Amendment, page 44.

IV.

The perpetual right of way of the Louisville and Nashville Railroad Company was taxable in this case. The company owned and held the land as its absolute, exclusive property. No attempt was or will be made to find a servient estate to show that the road held only a dominant easement. The vague, indefinite possibility of reversion in some unknown and

unknowable person is certainly not property to be taxed for the cost of the street. Such being the case, unless the real estate has ceased to exist, the railroad must own property as contemplated by the statute.

"The words employed in the deed express absolute dominion and complete enjoyment. These constitute property and all that is understood in proprietorship." Caldwell vs. Fulton, 21 Pa., 763.

Judge Brewer, in Keener vs. Union Pacific, 31 Fed. Rep., 128, said:

> "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to indicate that strip which the railroad company appropriates for its use and upon which it builds its roadbed. Obviously, the term in the statute in this case has the latter significance, and taxation is to be upon that strip, assessed at its full cash value, which the railroad company has appropriated and is using as its right of way, and upon which, to its entire width, it has placed its tracks and side tracks."

In Kentucky it has never been held that the owner of a fee is alone taxable. Thus a life tenant must pay the cost of public improvements. Hackworth vs. Artificial Stone Company, 20 Ky. L. R., 1789. Charitable institutions, vested only with the use of property during a prescribed time and for a definite purpose, have always been required to meet the burdens of local taxation.

The previous rulings of the Kentucky Court of Appeals on the question of assessment of railroad rights of way are indicated in the opinions of Railroad Company vs. Obst and Stengel, decided February 18, 1875, and City of Ludlow vs. Southern Railroad, 78 Ky., 357. The following quotations from the above cases are found in the Ludlow opinion:

> "Real property held by railroad companies within the corporate limits of the City of Louisville is not exempt from street taxation. The terms of the grant of the power to tax for such purposes included all real estate, and that held by railroad companies, like that held by churches, colleges

and hospitals, and other institutions of like character, must bear its proportion of local burden. There is no constitutional restriction upon the power of the Legislature to impose local taxation upon railroad companies. It is a mere question of policy."

"The rulings of the Court of last resort in other States are almost uniformly in accord with the decision of this Court upon this question.

"In the City of Chicago vs. Baer (41 Ill., 306), it was held that a street railway was subject to assessment for the improvement of the street on which it was located.

"In the Northern Indiana R. R. Co. vs. Connelly (10 Ohio State, 164), it was held that the roadbed was assessable for the street improvement, notwithstanding the fact that the company derived no benefit from the improvement of the street.

"In the B. & M. R. R. Co. vs. Spearman (22 Iowa, 112), the depot grounds were held to be subject to assessment for street improvement.

"To the same effect are the cases of City of New Haven vs. Fair Haven and Westville R. R. Co., 38 Conn., 422; Street Railway Appeal, 32 Cal.; State vs. Newark, 3 Dutcher (N. J.); Taylor vs. Palmer, 31 Cal.; Drainage Co. Case, 11 La. Am.; Emery vs. Gas Co., 28 Cal.; State vs. New Brunswick, 1 Vroom; and Orance and Alexander Railroad Co. vs. the City of Alexander, 17 Grattan.

"We think that, both upon reason and authority, a lot held and owned by the railroad company as this is held and used, is as much subject to assessment for street improvements as if it belonged to a natural person. In the law authorizing the assessment there is no exemption of railroad property, nor exemption of property because of its application to certain uses."

The weight of authority in other States seems to be in keeping with the rulings of the Kentucky Appellate Court. A brief mention of decisions elsewhere is here made only to exhibit the trend of the decisions. The citations will also serve the purpose of emphasizing our contention that there is present in the record no constitutional question; the only controversy being

the proper interpretation of the assessment laws of the State.

In the case of Cicero vs. Chicago R. R. Co., 176 Ill., 501, the Court reviews a great number of cases decided by the Supreme Court of Illinois, and concludes as follows:

> "Under the cases cited, we regard the question settled that a street railway occupying a public street is liable to be assessed for a local improvement in the same manner as other property owners."

In Indianapolis & V. R. R. Co. vs. Capitol Paving & Const. Co., 54 N. E., 1076, the Indiana Appellate Court defines the term "lot" as employed in a statute providing for special assessment and its application to a railroad right of way.

> "It is further argued that the assessment is void because appellant's right of way is not 'lands or lots' within the meaning of the charter. A railroad company has an easement in grounds occupied by its tracks. An easement is an incorporeal right created by grant, and always carries with it an interest in the land in or over which it is to be enjoyed. 2 Minor Inst., 20 et seq. In some jurisdictions it is held that a street assessment cannot be enforced against a railroad's abutting right of way, because it is not land, and because public policy forbids the severance of the several parts essential to the use and operation of the road. See Chicago, M. & St. P. Ry. Co. vs. City of Milwaukee, 89 Wis., 506, 62 N. W., 417. But it has been held in this State that the right of way of a railway company abutting upon or bordering upon a street may be assessed for the improvement of the street. Railroad Co. vs. Hanna, 68 Ind., 562, and cases there cited; Railroad Co. vs. Hays, 17 Ind. App., 261, 44 N. E., 375; 45 N. E., 675, and 46 N. E., 597. See also Patterson & H. R. R. Co. vs. City of Passaic, 54 N. J. Law, 340; 23 Atl., 945."

In Paterson R. R. Co. vs. City of Passaic, 54 N. J. Law, 341, is found the following:

> "The cases of New Jersey R. Co. vs. City of Elizabeth, 8 Broom, 330, and Jersey City ads. New Jersey Midland Railroad Co., 13 Ib. 97, are authority for the proposition that the roadbed of the railroad company is property legally subject to assessment for municipal benefits."

The rule to be gathered from the collected adjudications on

the subject is laid down in Smith on Modern Law of Municipal Corporations, Sec. 1239, in this language:

> "Where the statute authorizes assessment for local improvements against abutting property, the right of way of a railroad company is assessable; and it need not be made against the right of way as an entirety, but may be against that part only which fronts on the improvement. A railroad right of way parallel to a street may be specially assessed for local improvements; but not where it is across the street; and so may lands used for a depot, warehouse, roundhouse and shops."

V.

The cases referred to by opposing counsel are not numerous, and simply evidence a difference of opinion as to the proper construction of assessment statutes. In two of the cases cited in support of the position taken by plaintiff in error, it is expressly stated that "Kentucky, New Jersey, Illinois, Ohio, California and Indiana hold that under the statutes of those States the right of way of a railroad is assessable for local improvements." Railroad vs. Milwaukee, 87 Wisc., 517; Railroad vs. City of Ottumwa, 112 Iowa, 304.

To sanction the contention of the Railroad Company in this case would seem to offer an easy method of avoiding all special assessments. A merchant, a manufacturer or a warehouseman, instead of taking a fee simple title to real estate, would have granted them a perpetual user to the property for purposes necessary to the transaction of their business. Then by showing that the improvement of a highway did not promote their business (hauling being done from another door and over another street) and further representing that they had only a right of way in the property, all burdens of local taxation could be avoided. This is a sure and certain deduction from the argument of counsel for plaintiff in error, and in its manifest unsoundness is presented a complete answer to the contentions made by our adversary.

It would seem that no property in the community ought in fairness and as a matter of common sense contribute more certainly to the cost of improvements than a railroad, regardless whether the property taxed be a freight depot, a passenger station or a right of way adjacent to such depot and sta-

tion. The special use made of the property on the day the assessment is made, ought not to determine the question of liability to or exemption from taxation. Tomorrow a depot for freight and passengers may be located on or in connection with the property taxed, and the greatest benefit obtained from the improvement of the adjacent street which affords access to the railroad and makes the operation of its system not only profitable but possible.

Respectfully submitted,

BENJAMIN F. WASHER,
WILLIAM FURLONG,
Counsel for the Defendant in Error,
Barber Asphalt Paving Co.

HENRY L. STONE,
Counsel for the Defendant in Error,
City of Louisville.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows: The sections quoted are portions of an act of the Kentucky Legislature, entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed, Kentucky Statutes:

Public Ways.

Section 2832. **Public Ways—Improvements—Meaning of Terms.** Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. **(Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien.)** When the improvement is the original construction of any street, road, lane, alley, or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance. The General Council shall have power by ordinance, recommended by the Board of Public Works, to cause the digging and the walling

of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square from the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the General Council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the Board of Public Works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid. **(Section as amended by act of March 19, 1898, making radical changes in old section.)**

Section 2834. **Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance.** A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the General Council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the General Council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the General Council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. **Sidewalks and Curbing—Apportionment of Costs.** The cost of making sidewalks, including curbing,

whether by original construction or reconstruction, shall be apportioned to the front foot, as owned by the parties respectively fronting said improvement, except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. **Property Owners Permitted to Improve Public Ways.** The Board of Public Works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the Board of Public Works.

Section 2837. **Inspection and Reception of Work—Publication of Notice.** When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the Board of Public Works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents, and representatives, may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. **Action to Enforce Lien—Evidence—Provision for Redemption.** In all actions to enforce liens, a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be **prima facie** evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be **prima facie** evidence of every other fact necessary to be established by the plaintiff in such actions to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent.

per annum, and all the taxes and assessments on and against such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments; and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. **Apportionment Warrants—Registration—Lien.** The Board of Public Works shall make out all apportionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs, and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphabetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the Board of Public Works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.

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MAR 2
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 170.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plaintiff in Error*,

vs.

BARBER ASPHALT PAVING COMPANY, THE CITY OF LOUISVILLE, *Defendants in Error*.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendants in Error.

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PRESS OF THE GLOBE PRINTING CO.

Supreme Court of the United States.

OCTOBER TERM, 1904.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, THE CITY OF LOUISVILLE, - *Defendants in Error.*

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Brief for Defendants in Error.

The Kentucky statutes governing special taxation for local improvements provide that the cost of constructing public ways shall be assessed against the lots in quarter squares contiguous to the improvement, and equally apportioned within such district according to the square feet contained in each lot. A "square" is defined as being a subdivision of territory bounded on all sides by principal streets. In the appendix to this brief will be found the statutes in full. The plan of assessment prevailing in Kentucky is commonly designated as the area rule, and has been in effect since the organization of the Commonwealth. The legislature designates the district presumed to be benefited, and all lots within the district are required to pay their proportionate part of the cost of the improvement. The plan is both certain and fair, and in its ultimate application works an equality characteristic of no other system of assessment.

In Kentucky the original construction of public ways is alone the subject of special assessment, all reconstruction and repairs being made by the municipality, and paid out of general taxes collected for the purpose. Since public improvements have been known to Kentucky, their initial cost has been paid by the quarter square method of taxation, and to alter or amend the rule at this time would produce such injustice upon those property holders who have heretofore been required to improve adjacent public ways, that this Court, under any circumstances, would be slow to declare that a different scheme must be adopted. In addition property values have been adjusted on the basis of the tax as heretofore imposed. Purchases of real estate, whether by contract of parties or condemnation in Court, have at all times been made at a figure, larger or less, according as the adjacent streets have been improved and paid for or are yet to be constructed and the cost taxed against the property.

The power exercised by the Kentucky Legislature in the enactment of its laws regulating special assessments has been repeatedly approved by this Court as in accord with the Constitution of the United States and the amendments thereto. So many announcements on the subject have gone forth from this Court, that it would seem to be settled beyond denial or dispute that a legislature may designate the district to be assessed for local public improvements, and having so acted, its determination respecting benefits to the land within the district prescribed is final and conclusive. The legislative ascertainment of benefit is controlling upon courts just as the findings of commissioners are held to be, when the legislature delegates the power of deciding the matter of benefit to a special board or commission.

These familiar principles are so fixedly established as to merit the description of legal postulates. They have been recognized and enforced with such unanimity as to make it a source of surprise that at this day their correctness should be questioned or their application resisted.

Not only has the general plan of special assessment prevailing in Kentucky been repeatedly sustained as constitutional by this Court, but the very statutes here under consideration have

been examined and a decision thereon rendered, upholding the enactments of the Kentucky Legislature as well within its constitutional powers.

The plaintiff in error first attacks the Kentucky system in general, and then assails the application of the plan to what adversary counsel is pleased to term "the peculiar case at bar." This description of the case is certainly maladroit. It can be peculiar only in elements that would strengthen the justice and propriety of the special assessment claimed by plaintiff in error to be unconstitutional.

The Court of Appeals of Kentucky, in its decision of this case, held that the tax, in accordance with the well settled law of the State, has been imposed, not upon the special use or limited estate to which the property is subject in the hands of the Louisville & Nashville Railroad, but has been laid upon the lot of land within the taxing district just as is the case with every other lot within the territory liable to assessment. So that if it be not true that the perpetual right of way of a railroad company consumes the entire title to the real estate, and is therefore not a lot within the Kentucky assessment statutes, it still remains an uncontrovertible fact that the right of way, together with the servient estate, does constitute a lot, and every possible interest in the land has been put in lien by the assessment claim. It is the real estate within the district, irrespective of the presence of the plaintiff in error or any peculiar occupation of the premises, that has been assessed in this case and is involved by these proceedings.

A sure and easy escape from every form of special taxation is afforded by the argument of plaintiff in error. If land ceases to be such on account of easements imposed upon it; if a lot is not a lot when a railroad right of way exists in connection with it, then a property holder need only enjoy his estate in a peculiar way to produce complete exemption from the burdens of local taxation.

It is to be remembered that if the land here involved is released from the assessment now in controversy, it can at no future time be called upon or required to contribute to the cost of improving the adjacent street. In a day or a month hence

the special use may have ceased and the easement no longer exist, yet all reconstruction and repairs of the street are borne by a general tax.

It is nowhere contended that the land aside from the purpose to which it happens at this time to be employed would and does not receive the same measure of special benefit as results to other lots within the district subject to the tax; nor is it argued that other lots have not been benefited by the improvement.

II.

The argument of plaintiff in error, on which a reversal of the decision of the Court of Appeals of Kentucky is asked, rests upon a manifest illogical method of reasoning. It seems to be admitted by counsel representing plaintiff in error that a legislative determination of benefit and a plan of special assessment based thereon, is not repugnant to the Fourteenth Amendment of the Federal Constitution. It is not contended that the area or square foot method of assessing the cost of local improvements conflicts with any provision, either of the Kentucky State Constitution or the Constitution of the United States. On the contrary, plaintiff in error is forced to concede that the decisions of this Court have long since settled the doctrine that the legislature may exercise a discretion and determine the district presumed to be benefited by a local improvement.

It is, however, contended by plaintiff in error that after such legislative determination, the Courts can and must try any complaint setting up lack of benefit. And here occurs what seems to us to be bad law and worse logic. It is a contradiction in terms, to say that the legislature of a state may prescribe the tax district to be assessed for the cost of a local improvement, and at the same time to contend that each individual property holder within the limits fixed by the legislature may try in court the question of whether or not his particular, individual portion of property has received benefits in exact proportion to the amount of taxes imposed. Nothing remains of the legislative power and its exercise, if the Courts are to decide what benefit or lack of benefit has resulted to each lot.

The application of such a scheme of apportioning local tax-

ation as is presented by the argument of plaintiff in error leads to a palpable absurdity. The legislature exercising a power conceded by adversary counsel to be proper, fixes the territory liable for the cost of a public improvement by designating a certain district contiguous to the improvement. The tax levied in accordance with such a plan has been uniformly sustained, upon the idea that the legislature need not delegate the ascertainment of benefit to a special tribunal, but may decide for itself the property to be benefited. After designating the district benefited, an apportionment of the cost must be made upon all property within the limits defined. After such proceedings have been taken, it cannot be allowed to the several individual lot owners to invoke the interposition of a court in challenging the correctness of the amount assessed against their property. To tolerate such proceedings on the part of property holders, means to release such parties as have not received a full measure of benefit for every dollar of tax, and at the same time deprive the state or municipality of the right to recoup by additional assessments upon persons and property receiving benefits in excess of the amount charged against them.

From this manifest injustice to the taxing authority, necessarily arises the rule that one plan or the other must be adopted in placing the burdens of special taxation; either the legislature must constitute a board or body to hear and determine all questions of benefits arising from local improvements and levy an assessment in accordance with its findings, or the legislature must itself determine the property benefited and conclusively fix the amount of the tax which each parcel of real estate must bear. No combination of the two systems, such as the plaintiff in error contends for, is capable of safe or satisfactory application, and no legislature has ever adopted such a rule, and no court has ever sanctioned such a plan.

III.

In French vs. Barber Asphalt Paving Company, 181 U. S., 324, this Court attemped to put at rest all discussion and debate relative to the scope of the decision in Norwood vs. Baker, 172 U. S., 269. Language in that opinion gave inspiration for the

argument that Norwood vs. Baker held as void any plan of assessment not based upon special benefits to be determined by tribunals organized for such purpose. French vs. Barber Asphalt Paving Company was intended to and did decide that Norwood vs. Baker went no further than the facts of the case justified a ruling. No one has ever doubted the correctness of the Court's decision in holding that the City of Norwood could not take from Mrs. Baker a valuable portion of her property, assume to pay her for the estate employed for public purposes, and then force a return of the purchase price, and incidental costs, by the imposition of an alleged tax. Radically different is that announcement of legal rights from a decision holding unconstitutional systems of special assessment in vogue in a majority of the states of the Union and declaring invalid claims of many millions of dollars, the result of work done and money expended, on the idea that taxing laws which have existed since the organization of this government, were not in violation of the Federal Constitution.

In French vs. Barber Asphalt Paving Company, this Court is particular to affirm and reaffirm the validity of those systems of taxation in which the legislature, determining finally and conclusively the question of benefits, prescribes the tax territory to contribute to the cost of local improvements.

> "The legislature may commit the ascertainment of the sum "to be raised and of the benefited district, to commissioners, "but it is not bound to do so, and may settle both questions "for itself, and when it does so, its action is necessarily con- "clusive and beyond review."
>
> "The question of special benefit and the property to which "it extends, is of necessity a question of fact; and when the "legislature determines it in a case within its general power, "its decision must of course be final."
>
> "The legislature has the power to determine what lands "which might be benefited by the improvement are in fact "benefited, and if it does so, its determination is conclusive "upon the owners and the Courts, and the owners have no "right to be heard on the question whether their lands are "benefited or not, but only upon the validity of the assess-

"ment and its apportionment among different parcels of the "class which the legislature has conclusively determined to "be benefited."

"The legislature has power to fix a district for itself with- "out any hearing as to benefits, for the purpose of assessing "upon the lands within the district the cost of a local public "improvement. The legislature, when it fixes the district "itself, is supposed to have made proper inquiry and to have "finally and conclusively determined the fact of benefits to "the land included in the district, and the citizen has no con- "stitutional right to any other or further hearing upon that "question."

"The rule of apportionment among the parcels of land ben- "efited also rests within the discretion of the legislature, and "may be directed to be in proportion to the position or front- "age or area or market value of the land or in proportion to "the benefits as estimated by the Commissioners."

All of these statements of law are sanctioned by this Court in French vs. Barber Asphalt Paving Company, and in the light of their plain and positive declaration of principle, it is quite remarkable that counsel for plaintiff in error should represent that in no case has this Court either decided or intimated that a property holder would not be heard in every instance where he had not received one hundred cents of benefit for every dollar of tax.

IV.

The opinion in French vs. Barber Asphalt Paving Company is supported by an abundance of authorities previously emanating from this Court.

"That whenever by the laws of a state or by state authority "a tax, assessment, servitude or other burden is imposed "upon property for the public use, whether it be of the whole "State or of some more limited portion of the community, "and those laws provide for a mode of confirming or con- "testing the charge thus imposed in the ordinary course of "justice, with such notice to the person or such proceedings "in regard to the property as is appropriate to the nature of "the case, the judgment in such proceeding cannot be said

"to deprive the owner of his property without due process of "law, however obnoxious it may be to other objections."

"It is said that part of the property of plaintiff assessed "is not benefited by the improvement. But this is a matter of "detail with which this court cannot interfere, if it were clear- "ly so; but it is hard to fix a limit within these two parishes "where property would not be benefited by the removal of "the swamps and marshes, which are within their bounds." (Davidson vs. New Orleans, 96 U. S., 97.)

"It may be that the burden laid upon the property of com- "plainants is onerous. Special assessments for special road "or street improvements very often are oppressive. But that "the legislative power may authorize them and may direct "them to be made in proportion to the frontage, area or mar- "ket value of the adjoining property, at its discretion, is under "the decisions no longer an open question." (Mattingly vs. District of Columbia, 97 U. S., 687.)

"When the determination of the lands to be benefited is "entrusted to commissioners, the owners may be entitled to "notice and hearing upon the questions whether their lands "are benefited and how much. But the legislature has the "power to determine, by the statute imposing the tax, what "lands, which might be benefited by the improvement, are in "fact benefited; and if it does so, its determination is con- "clusive upon the owners and the courts, and the owners "have no right to be heard upon the question whether their "lands are benefited or not, but only upon the validity of "the assessment, and its apportionment among the different "parcels of the class which the legislature has conclusively "determined to be benefited.

"In determining what lands are benefited by the improve- "ment the Legislature may avail itself of such information as it "deems sufficient, either through investigation by its com- "mittees, or by adopting as its own the estimate or conclusions "of others, whether those estimates or conclusions previously "had or had not any legal sanction." (Spencer vs. Merchant, 125 U. S., 345.)

"By this legislation a comprehensive system regulating "the supply of water and the erection and maintenance of "reservoirs and water mains was established, and of this "legislation every property owner in the District must be pre- "sumed to have notice. And, accordingly, when by the Act "of August 11, 1894, Congress enacted that thereafter assess- "ments levied for laying water mains in the District of Colum-

"bia should be at the rate of one dollar and twenty-five cents "per linear foot against all lots or land abutting upon the "street, road, or alley in which a water main shall be laid, "such an act must be deemed conclusive alike of the question "of the necessity of the work, and of the benefits as against "abutting property. To open such questions for review by "the courts on the petition of any or every property holder "would create endless confusion." (Parsons vs. District of Columbia, 170 U. S., 45.)

"Assume that the only theory of these assessments for "local improvements upon which they can stand is that they "are imposed on account of the benefits received, and that "no land ought in justice, to be assessed for a greater sum "than the benefits received by it, yet it is plain that the fact "of the amount of benefits is not susceptible of that accurate "determination which appertains to a demonstration in "geometry. Some means of arriving at this amount must be "used, and the same method may be more or less accurate in "different cases involving different facts. Some choice is to "be made, and where the fact of some benefit accruing to all "the lands has been legally found, can it be that the adoption "of an ad valorem method of assessing the lands is to be held "a violation of the Federal Constitution? It seems to us "clearly not. It is one of those matters of detail in arriving "at the proper and fair amount and proportion of the tax that "is to be levied on the land, with regard to the benefits it "has received which is open to the discretion of the state "legislature, and with which this Court ought to have noth- "ing to do. The way of arriving at the amount may be in "some instances inequitable and unequal, but that is far from "rising to the level of a constitutional problem and far from "a case of taking property without due process of law." . . .

"In Walston vs. Nevin, 128 U. S., 578, an assessment was "laid upon lands for benefits received from construction of a "local improvement, according to the number of square feet "owned by the land owner. It was urged that it was not an "assessment governed by the amount of benefits received, "but was an absolutely arbitrary and illegal method of as- "sessment. This Court held the objection not well founded "and that the matter was for the decision of the legislature "to which body the discretion was committed, of providing for "the payment of the improvement."

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

V.

French vs. Barber Asphalt Paving Company has been followed by a number of adjudications subsequently made in this Court. In the same volume in which the opinion in the case just mentioned appears, there is also to be found Wight vs. Davidson, p. 371; Tonawanda vs. Lyon, p. 389; Webster. vs. Fargo, p. 394; Cass Farm Company vs. Detroit, p. 396; Detroit vs. Parker, p. 399.

The following extracts are from the later cases:

"The case of Norwood vs. Baker presented, as the judge "in the court in the present case well said, 'considerations of "peculiar and extraordinary hardships,' amounting, in the "opinion of a majority of the judges of this court, to actual "confiscation of private property to public use, and bringing "the case fairly within the reach of the Fourteenth Amend-"ment.

"The facts disclosed by the present record do not show any "abuse of the law, nor that the burdens imposed upon the "property of the complainant were other than those imposed "upon other persons in like circumstances." (Tonawanda vs. Lyon.)

"We have recently held that it was not the intention of "the Fourteenth Amendment to subvert the systems of the "states pertaining to general and special taxation; that that "amendment legitimately operates to extend to the citizens "and residents of the state the same protection against arbi-"trary state legislation affecting life, liberty and property as "is afforded by the Fifth Amendment against similar legisla-"tion by Congress, and that the federal courts ought not to "interfere when what is complained of is the enforcement of "the settled laws of the state applicable to all persons in like "circumstances and conditions, but only when there is some "abuse of law amounting to confiscation of property or de-"privation of personal rights as was instanced in the case of "Norwood vs. Baker." (Cass Farm Co. vs. Detroit.)

In King vs. Portland City, 184 U. S., 61, the following quotation is made by the Court with approval:

"But we are inclined to believe that the better doctrine "deducible from adjudged cases, including those of the Su-"preme Court of the United States, is that the assessment

"will be upheld whenever it is not patent and obvious from "the nature and location of the property involved, the dis- "trict prescribed, the condition and character of the improve- "ment, the cost and relative value of the property to the as- "sessment, that the plan or method adopted has resulted in "imposing a burden in substantial excess of the benefits or "disproportionate within the district as between owners."

Plaintiff in error seizes upon this utterance as sustaining the contention that each specific and individual tax claim must rest upon benefits derived. The citation does not seem to admit of such construction. The district designated by the legislature is presumed to be benefited. That presumption is conclusive in the absence of anything showing that from the nature and location of the property involved, and the character of the improvement, no benefit to the district could possibly accrue. The only remaining character of attack on an assessment resulting from a legislative ascertainment of benefit must be based upon proof that the apportionment between owners within the district has been disproportionate, and therefore unfair. Such are apparently the propositions to be deduced from King vs. Portland as quoted.

In Chadwick vs. Kelley, 187 U. S., 540, this court held the following views "to be consonant with the great weight of authority, both state and federal:"

"It is too late to question the right of the general assembly "to establish particular districts for the attainment of special "local public good, through works of a particular character, "and to order itself, or authorize some political body to order, "special assessments to be made within the district for the "purpose of meeting the costs and expenses of such works. "It is true that in some instances almost the whole benefit "accrues to a few, but there can be no universal rule of justice "upon which such assessment can be made. An apportion- "ment of the costs that would be just in one case would be "oppressive in another. For this reason, the power to de- "termine when a special assessment shall be made and on "what basis it shall be apportioned, rests in the legislature "or some political body to which it has delegated that author- "ity." . . . . . .

"It cannot be exacted, for the purpose of sustaining the "constitutionality of a statute or ordinance authorizing a work "of local public improvement at the cost of abutting owners, "that it be shown there is a benefit in every possible respect "to the particular owners, nor that the benefit be direct and "immediate. The general assembly has conferred upon the "common council the right and power to constitute any par- "ticular street, which it proposes to pave, a special taxing dis- "trict for the purpose of meeting the cost of making such pav- "ing. It has exercised this right and power in the matter of "paving Hagan Avenue. Having done so, the legislature it- "self has designated how, in what proportion, and by what "standard this cost is to be met. The council was not at "liberty to depart from this apportionment. The judiciary "is not authorized to alter it and to substitute for a fixed "legislative standard a fluctuating judicial standard based "upon actual benefits received and measured by values or en- "hanced values to be established by evidence and proof."

In the light of this very strong declaration of the law, it is quite remarkable that counsel for plaintiff in error is unable to find anywhere a retraction of Norwood vs. Baker, as construed by him, holding unconstitutional any plan of distributing local taxation other than special benefits for each and every specific parcel of property concerned in the tax.

In Seattle vs. Kelleher, 195 U. S., 351, we have the last ruling of this Court on the question here at issue, and with this as the epitome of the Court's decision:

"It was within the power of the legislature to create or to "authorize the creation of special taxing dictricts, and to "charge the cost of a local improvement upon the property "in such a district by frontage."

Webster vs. Fargo, 181 U. S., 394; French vs. Barber Asphalt Paving Company, 181 U. S., 324; McNamee vs. Decoma, 24 Wash., 591; Cooley, Constitutional Limitation, 729.

The facts of the last mentioned case are doubtless remembered by the Court. It was contended by the appellee, the decree being reversed, that it was "grossly unnecessary and unjust to include a vacant, unoccupied tract in a district which was to bear the expense of planking, when that planking was extended only along the settled portion of the street, and was

to stop a thousand feet from the tract vacant and wild." Norwood vs. Baker was relied upon as sustaining the decision of the lower court. Its application to the question involved was denied by this Court.

The assessment challenged as unconstitutional in the case now submitted is but the enforcement of the settled laws of Kentucky applied, since the origin of the state, to all persons in like circumstances and under similar conditions.

VI.

As illustrating the unbroken line of adjudication in the Kentucky Court of Appeals, the following quotations are made:

The opinion in City of Lexington vs. McQuillan's Heirs, 9 Dana, 39 Ky., 513, was rendered by Judge Marshall in 1839, and furnishes an exhaustive and learned treatment of the question. A portion is extracted:

> "When taxes are levied, therefore, they must be imposed "on the public in whose name and for whose benefit they are "required, and to whom those who impose them are respon-"sible. And although there may be a discrimination in the "subjects of taxation still persons in the same class and "property of the same kind must generally be subjected alike "to the same common burden. This alone is taxation, accord-"ing to our notion of constitutional taxation in Kentucky.
>
> "The city council, representing, as it does, the whole con-"federation of squares, may be deemed the representatives of "each square, in some such sense as that in which the jus-"tices appointed by the Commonwealth may be considered "as the representatives of the interest and public will of the "people of any county. Graded and paved streets are com-"mon in Lexington and should be desired and expected in "such a city, by all the citizens; and each square being made "liable for the cost incident to its own streets and sidewalks, "under the control of the unanimous city council, though the "burthen on one square may sometimes exceed that of an-"other—yet there appears to be amongst them all, as much or "nearly as much, reciprocity as that which exists in a similar "respect, among the several counties of the States.
>
> "As all the streets and sidewalks may be expected to be "improved at some time, in a manner substantially the same—"the principal question decided by the council in this case, "was only as to the time when those opposite to the square

"including the lot of McQuillan's heirs should be improved. "The County Court decided similar questions without ob- "jection to their power, or the validity of their decision.

"All the streets have been made many years prior to the "incorporation of the city; most of them had been graded "and paved prior to the year 1826, and always in the mode "now objected to, as unconstitutional. Other cities in the "United States, as well as Europe, have been improved in a "similar manner; this mode and this usage, in towns and "cities, may have been generally understood when our con- "stitution was adopted; the 11th section of the charter of Lex- "ington only re-enacted what had been the established rule "respecting its streets and sidewalks; the citizens were famil- "iar with that rule, and, thus, understanding it, they accepted "the charter as it is. In Louisiana, South Carolina, and "Pennsylvania the judiciary has sanctioned, as constitntional, "the application of the same or a similar principle to the "streets and sidewalks of cities of those states, respectively; "in New York and Massachusetts, it has been virtually recog- "nized by the state courts, and it has been declared uncon- "stitutional by no court, so far as we have been able to ascer- "tain."

In 1841 the Court of Appeals, by Chief Justice Robertson, decided the case of City of Louisville vs. Hyatt, reported in 2 Ben Monroe, 177. The following is quoted:

"We do not feel inclined, therefore, to retract or essen- "tially qualify the opinion in the case of the City of Lexing- "ton vs. McQuillan's Heirs, neither subsequent reflection nor "argument, having, in any degree, shaken our judgment as "to the correctness of it.

"In that opinion we suggested that, so far as improvements "of streets may be concerned, the charter had virtually sub- "divided the city into subordinate quasi municipalities or "communities, each consisting of the lot holders in a defined "square,—and is not this substantially true? Does not the "charter of each of the cities of Louisville and Lexington "authorize 'the owners of a majority of lots or parts of lots "fronting on any square' to require the improvement of any "street bounding their square, at the expense of all the own- "ers of ground, on their portion of that street and also author- "ize the mayor and council, by unanimous vote in council, to "make the like improvement of fractions of streets by squares "at the like distributive cost of the local proprietors? And in "this anomalous provision, in one aspect of it so democratic

"and in the other so carefully guarded against oppression or "gross injustice, we have been unable to perceive any suf- "ficient ground for deciding that the fundamental law of the "state had been violated; and we presume that, in the prudent "exercise of this police authority, unreasonable inequality of "burthen will rarely, if ever, be imposed, considering the past "and prospective improvement of the several squares in the "same prescribed mode.

"And, in opinion, the learned chancellor (of the Circuit), "in criticising, as he was pleased to do, the suggestion as to "the subdivision, as just defined, of the aggregate municipal- "ity, and characterizing such a corporation as Briarian, "thought fit to illustrate his conviction of its absurdity, in "the following manner: 'But as the giant Briarius of fifty "heads!! was buried under Mount Aetna for his crimes in "assisting the giants against the gods, so this gigantic cor- "poration of more than one hundred and fifty heads (son of "Somnus and Luna) ought to be buried under poppies in a "cave where the sun never penetrates for warring against "the constitution and common sense.'

"We could not wander so far from the judicial path as to "reply to the venerable chancellor's misapplied apologue "from the most fanciful Grecian poets of old; we have thought "proper to quote it, for publication in our legal report, only as "an illustrative episode to a constitutional argument by a "patriarchal jurist. But, not acknowledging mythology to be "the law nor Hesiod to be authoritative on a question of "political power in Kentucky, we must still adhere to the "opinion in The City of Lexington vs. McQuillan's Heirs, "Somnus and Luna and the poppies and even the cave in ter- "rorem, notwithstanding."

In the City of Louisville vs. Louisville Rolling Mill Company, 3 Bush, 424 (1867), the Court says:

"The right of eminent domain—the right to take private "property for the public use—is a power almost without "limit; but this essential safeguard is thrown around the "owner that the public who wants or needs his property must "compensate him for it. Nor does this in any wise impair "or conflict with the essential right and power of local govern- "ment over communities such as towns or cities, in ordinary "cases, to have the street improved at the expense of the "property holders thereon; for, ordinarily they are most ben- "efited, and it is only requiring them to keep their property "in such condition as not to obstruct or injuriously hinder the

"public; for, legally speaking, each lot owner holds the legal "title to one-half of the street in his front, subject, it is true, "to the public easement; besides, it may ordinarily be, and "generally is, only a fair portion of the tax which may justly "and legally be laid on him, to keep up the streets and public "passways which are so peculiarly beneficial to the realty of "all towns and cities; and, moreover, each proprietor may be "presumed to have purchased in contemplation of the power "in the local authorities to direct him to erect such improve- "ments, as are ordinary and usual."

In the case of Howell, etc., vs. Bristol, etc., 8 Bush, 498, it is said:

"To compel the property owners upon this street to im- "prove and keep it in repair, upon terms similar to those "applied to the owners of property on other streets in the "city, might of itself, be regarded as imposing upon them an "undue proportion of the public burdens. But so long as "such burdens are so imposed as to keep within what may "be legitimately deemed a tax, not a mere spoliation, it is a "hardship against which the courts can afford no relief. Per- "fect equality in the imposition of local taxation cannot be "attained, but uniformity in the matter of assessment and "approximate equality in the amount of exactions, are cer- "tainly within the range of possibility; and such uniformity "and approximate equality were by this Court, in the case of "McQuillan's heirs, held to be essential to the constitution- "ality of such taxation."

In Loeser vs. Redd & Bros., 14 Bush, 20, the Court says:

"One of the provisions of the charter in regard to such "improvements is in substance that the improvement shall "be made at the exclusive cost of the owners of lots in each "fourth of a square to be equally apportioned by the general "council according to the number of square feet owned by "them respectively, etc. Under this provision of the charter, "where the property is bounded on all sides by principal "streets, or the territory is laid off into squares, there is no "difficulty in making the assessment; the charter in such a "case has provided the manner in which the assessment shall "be made and every foot of land within the fourth of a square "must contribute to pay for the improvement. The city "council orders the improvement and the law provides the "mode of assessment and the property to be assessed. In "such cases when a mistake has been made in the assess-

"ment, and a party owning property within the fourth c
"square has paid too much, or been omitted from the ass
"ment or the Council has gone beyond the fourth of a squ
"in making the assessment, the courts have the right to c
"rect the mistake or rectify the error, for the reason that
"law, when the improvement is ordered, creates and fi
"the liability. No discretion is left with the Court or Cou
"as to the party to be charged or as to the property to
"fixed. The chancellor is only enforcing the law by requir
"the property already selected as the subject for taxation
"the particular case to pay it." . . . . . .

In the case of Pearson vs. Zable, 78 Ky., 170 (1879), t
Court holds:

"That the right to make local assessments for local i
"provements is based on the fact that property in close pro
"imity to the improvement derives a peculiar benefit from t
"improvements, has generally been conceded, and we assu
"that such is its basis." (Cooley, Constitutional Limitatio
page 630, 4th Ed., and authorities there cited.)

"But it by no means follows that each piece of prope
"within the bounds over which the assessment extends mu
"in fact, derive benefit from the improvement. The area ov
"which the assessment extends constitutes for the occasi
"a tax district. Whether the property within the district, co
"sidered as an entirety, will be benefited by the proposed i
"provement, is a question to be decided primarily by t
"legislature. And when that department, whether acti
"directly or through the local authorities, to which it m
"have delegated the power to determine when such improv
"ments shall be made, directs an improvement to be mad
"and the cost of making it to be assessed upon adjacent pro
"erty, there is a decision by the legislature that the proper
"within the district will be benefited.

"This decision will generally be final and conclusive upo
"the question of benefits to the district as a whole, and als
"that public convenience demand the improvements to b
"made. Whether there might not be a case in which the al
"sence of benefits and of public necessity for the improv
"ment would be so clear and palpable as to warrant th
"courts in pronouncing the legislative act a mere license fo
"spoliation under the guise of making public improvement
"we need not inquire. It is not claimed that the grading o
"Elizabeth street has not been beneficial to the property as
"sessed to pay for it, when considered as a whole. All tha

"is claimed is that it was not beneficial to the appellant's lot.

"It is impossible so to adjust public burdens of any de-"scription, as to secure perfect equality; all that can be done "is to approximate it, and moreover there must be uniformity "in taxation in all its branches. Not uniformity when con-"sidered with respect to benefits derived from the expendi-"ture of taxes, but uniformity in their imposition."

In the case of Preston vs. Rudd, 84 Ky., 150 (1886), is found the following:

"In considering the question, however, we must look to "the area which constitutes the tax district. The legislature, "or the municipality to which it has delegated authority to "act in the matter, must, from necessity, decide primarily "whether the assessed area or tax district as an entirety will "be benefited by the contemplated improvement; and its de-"cision upon the question, and whether the public need de-"mands an improvement, must be regarded as final, unless "the absence of benefit and public need of the improvement "manifest that it is spoliation, and not legitimate taxation.

"The question of assessment or apportionment cannot be "governed by an advantage or disadvantage to one person "within the district.

"If so, public improvements could rarely be made. The "legislature must necessarily look at the district as a whole, "and upon this general view determine whether such benefits "will accrue from the improvement, as will authorize its cost "to be imposed upon the adjacent property. Such assess-"ments are made upon the assumption that a portion of the "community are specially benefited by the improvement; the "principle is that the territory is benefited; that it has a com-"mon interest, and that governed by equitable rules, it must "equally bear the burden.

"Necessarily, individual cases of hardship will arrive; but "it approaches equality as nearly as is practicable; it follows "that a lot owner may be compelled to pay his proportion of "the cost of an improvement, although in this particular case "his property may not be benefited."

In Barfield vs. Gleason, 111 Ky., 491 (1901), the Court of Appeals considers the question in the light of Norwood vs. Baker. The following is from the opinion:

"In Baptist Church vs. Matee, 8 Bush, 510, the doctrine, together with the constitutional limitation, is thus stated by Judge Lindsay:

"'It is certainly well settled in this state that the cost of "the original construction of streets of a city may be imposed "upon the owners of real estate alone without violating the "constitutional limitations upon the legislative power of tax-"ation . . . In proportion as the trade and population of the "city increases the value of real estate advances. The owners "of such real estate receive and enjoy very nearly the sole "permanent advantage accruing to the city from the con-"struction, repairs and reconstruction of the streets, upon "which that property may be situated. The general public "certainly receives incidental benefits from such improve-"ments, but the benefits to owners of real property are di-"rectly appreciable and permanent. The original improve-"ment enhances the value of lots adjacent to the street im-"proved by making it accessible to the public and attracting "trade and population. (Preston vs. Roberts, 12 Bush, 570; "Nevin vs. Roach, Watson vs. Nevin, 86 Ky., 492.')

"The same doctrine has been again and again affirmed "arising under the new Constitution. (Gleason vs. Harnett, "20 Ky. Law Rep., 694; Gosnell vs. City of Lou., 20 Ky. "Law Rep., 519; McNaghton vs. Louisville Ind. School of "Reform, 19 Ky. Law Rep., 1695.) This question is no longer "an open one.

"While this system of taxation for local assessment pro-"ceeds upon the theory of equivalents, exact compensation "has never been attainable, or even hoped for under any "system yet devised. The question, whether contiguous ter-"ritory would be benefited, and the boundary within which "benefit therefrom is to be presumed has uniformly been "construed to be a matter of legislative discretion, and that "discretion having been exercised with the presumption of "law in favor of its correctness, the courts will not intervene "to disturb the legislative determination except upon a show-"ing of facts, so conclusive, as amply to justify their inter-"ference.

"Upon the authority of the opinion of Mr. Justice Harlan, "172 U. S., 269, an immense volume of argument has been "devoted to the proposition that the Kentucky Statute is "violative of the Fourteenth Amendment to the Constitution "of the United States, in that there is no provision made "by the statute for a preliminary hearing as to the extent "of special benefits to each piece of property resulting from "the improvement.

"An extended consideration of this argument has been "rendered unnecessary by recent decisions of the Supreme "Court of the United States in the cases of French vs. Barber

"Asphalt Pav. Co.; Wormley vs. District of Columbia; "Hoover Allen vs. District of Columbia; Wight, etc., vs. "Davidson, etc.; Tonawanda vs. Lyons, all rendered on the "29th day of April last and to appear in 181 U. S. Reports."

In Pfaffinger vs. Kremer, 24 Ky. Law Rep., 2370; 74 S. W. Rep., 238 (1903), the Court says:

"For appellee it is argued that the test is not whether the "value of the property within the apportionment district is "less than the cost of the improvement apportioned against "it, but whether such proportion of cost of the improvement "is as much or more than the value of the whole lot, of "which the part sought to be subjected to the tax is a parcel. "We cannot agree with this reasoning. The thing taxed is "the designated district, and that alone, nor its owner, nor "is it considered in connection with other property, held by 'the same owners. This must be so, because the true theory "underlying this method of taxation is that the territory "selected and made to bear the tax is the only one presumably "benefited thereby."

In the case of City of Louisville vs. Bitzer, 24 Ky. Law Rep., 2264; 73 S. W. Rep., 1115, it is again decided:

"The method of assessment by the foot has been followed "so long and has been so often approved by this Court, that "it no longer remains an open question. (Preston vs. Roberts, "75 Ky., 570; Nevin vs. Roach, 86 Ky., 492.) The rule also "is that while these assessments rest upon the basis of "benefits, or presumed benefits, to the property assessed, it "is not essential to their validity, that actual enhancement "in value or other benefits to each owner should be shown, "the judgment of the City Council being conclusive as to "the propriety of the improvement. (Pearson vs. Zable, 78 "Ky., 174; Ludlow vs. Trustees, 78 Ky., 360; Preston vs. "Rudd, 84 Ky., 156; Covington vs. Schultz, 16 Ky. Law "Rep., p. 831; Allen vs. Wood, 20 Ky. Law Rep., 61; Bullit "vs. Selvage, 20 Ky. Law Rep., 599.) On the other hand, it "is held that when owing to extraordinary facts, the pre-"sumption on which the rule rests does not apply, and to "force the owner to make the improvement is to confiscate "his property without compensation, this is spoliation and "will not be enforced. (Covington vs. Southgate, 54 Ky., 491; "Louisville vs. Louisville Rolling Mill Co., 66 Ky., 416; "Broadway Baptist Church vs. McAfee, 71 Ky., 508; Preston "vs. Rudd, 84 Ky., 150; France vs. Jacob, 88 Ky., 532; James "vs. Louisville, 19 Ky. Law Rep., 447.")

VII.

The Kentucky authorities have been reviewed at some length in order to fully acquaint this Court with the settled doctrine controlling special taxation in the state. Counsel for plaintiff in error may have left the Court under a misapprehension with the statement that "the legislature in 1893, seven years before the improvement now in question, was made, adopted a general rule," etc. As a matter of fact the general rule under which the present case was decided by the Kentucky Court of Appeals was adopted by the legislature of the state nearer one hundred and seven years ago, and observed in an unbroken line of cases throughout the entire judicial history of the state.

The reference to the Kentucky cases will also serve to convince the Court that rulings of the Kentucky Court of Appeals on the question of spoliation are not so untenable as plaintiff in error would have it appear. Upon an examination of the authorities it will be found that the rule adopted in Kentucky is in perfect agreement with the principles set forth in Norwood vs. Baker, and applied in the determination of that appeal. When a case presents "considerations of peculiar and extraordinary hardships amounting, in the opinion of the Judges of the Court of Appeals, to actual confiscation of private property to public use" the Kentucky law affords ample constitutional protection.

See City of Louisville vs. Bitzer, 22 Ky. Law Rep., 64.
Covington vs. Southgate, 54 Ky., 491.
Louisville vs. Rolling Mill Co., 66 Ky., 416.
Church vs. McAtee, 71 Ky., 508.
Franz vs. Jacob, 88 Ky., 532.

In the case cited by the plaintiff in error, Preston vs. Rudd, 84 Ky., 153, as well as in the many other cases cited above, the Court of Appeals fixed the constitutional limit of taxation and indicated the line of separation between a valid exercise of the taxing power on one hand and spoliation on the other. The conclusion reached was neither illogical or without precedent. It was in keeping both with the previous and subsequent adjudications of the Kentucky courts, and in accord with the announcement of law by a host of cases from other jurisdictions.

The Court of Appeals of Kentucky has always ruled that the Kentucky method of distributing the burdens of local improvements was based on legislative determination of benefits conclusive upon owners and the courts. That the legislature having ascertained the district benefited by the improvement it only remained to apportion the cost equally amongst the property in the district prescribed. That individual property holders could not complain or be heard upon the question of benefit except in those cases where the general doctrine of spoliation could be successfully invoked.

The doctrine of spoliation as applied in Preston vs. Rudd is not confined to special assessments, but is equally potent in every case of taxation, general or special, where constitutional limits are invaded, and a point reached where the conclusiveness of benefit attaching to the legislative distribution of a tax can no longer apply. There is no occasion in the present case for the invocation of the law of spoliation announced by the Kentucky Court of Appeals. The sole issue presented by the answer of the defendant in the State Court was that in this particular case no benefit had accrued to the railroad from the construction of Frankfort avenue. It has never been contended by the plaintiff in error that the district designated by the legislative enactment did not receive ample benefit, nor that the specific lot in controversy would not have been benefited, if otherwise employed than happened to be its use at the time of the improvement and this suit.

The State Court has decided that the finality of the determination of benefit by the legislature denied to the defendant in the State Court the right to be heard on the defense assumed to be presented by its answer.

It is earnestly submitted that there is no contradiction or impropriety in the position taken by the Kentucky Appellate Court and that the settled law of the State is not at variance with either the right or reason of the situation.

VIII.

In Walston vs. Nevin, 128 U. S., 578, this Court, under a writ of error to the Kentucky Court of Appeals, was called upon

to consider the application of the Fourteenth Amendment of the Constitution of the United States to the Statutes of Kentucky governing special assessment. The statute quoted by Mr. Chief Justice Fuller in his opinion will be found upon examination to be the same statute as here on review. (See appendix.) After a reference to the Kentucky authorities construing the statute and the case of Davidson vs. New Orleans, 96 U. S., 97, this Court said:

> "The conclusion was reached that neither the corporate "agency by which the work is done, the excessive price which "the statute allows therefor, nor the relative importance of "the work to the value of the land assessed, nor the fact that "the assessment is made before the work is done, nor that "the assessment is unequal as regards the benefits conferred, "nor that personal judgments are rendered for the amount "assessed, are matters in which the State authorities are con- "trolled by the Federal Constitution. So the determination of "the taxing district and the manner of apportionment are "all within the legislative power. Spencer vs. Merchant, 125 "U. S., 345; Stanley vs. Supervisors, 121 U. S., 535, 550; "Mobile vs. Kimball, 102 U. S., 691; Hagar vs. Reclamation "District No. 108, 111 U. S., 701; United States vs. Mem- "phis, 97 U. S., 284; Laramie County vs. Albany County, "92 U. S., 307. And whenever the law operates alike on all "persons and property, similarly situated, equal protection "cannot be said to be denied. Wurts vs. Hoagland, 114 U. "S., 606; Railroad Company vs. Richmond, 96 U. S., 521, "529. The remedy for abuse is in the State Courts, for, in the "language of Mr. Justice Field, in Mobile vs. Kimball, 'this "Court is not the harbor in which the people of a city or "county can find a refuge from ill-advised, unequal and op- "pressive State legislation.'
>
> "As the question raised in these cases is a Federal ques- "tion (Spencer vs. Merchant, supra), we will not sustain the "motions to dismiss; but as there was, in our judgment, "color for those motions, and the contention now made has "often been pressed upon our attention before, and as often "determined adversely, so that the rule must be regarded as "settled, we shall grant the motions to affirm."

IX.

The plaintiff in error attempts to differentiate its case and to invoke a special rule by allegation of its answer and argu-

ment of its counsel, to the effect that the Louisville & Nashville Railroad owns only a right of way on and over the property involved in the assessment. A fallacy fatal to the contentions of plaintiff in error is here to be noted.

The assessment laws of Kentucky and the municipal council of Louisville have not assumed to tax or hold liable the right of way or easement of the railroad company. The Statutes of Kentucky governing local taxation provide that the apportionment of the cost of a local improvement shall be made upon *lots* in the quarter squares binding upon the street improved. The name of the owner or the occupant of the lot is set forth in the apportionment for no other purpose than designating the real estate liable to respond for the tax imposed. The proceeding is entirely one in rem, out of which there results and can result no personal liability upon any person or corporation. The Louisville & Nashville Railroad Company is mentioned in the apportionment only for the purpose of describing with greater accuracy the lot of land charged by the assessment with its proper proportion of the cost of constructing Frankfort avenue.

It cannot alter the system of special taxation laid down by the Legislature of Kentucky that upon a portion of the land within the tax district the Louisville & Nashville Railroad owns an easement or exercises certain rights. If it be true that the plaintiff in error has nothing more than a dominant easement in the lot of land assessed in the construction of the street, then the servient estate must also pass in order to vest an absolute title in any purchaser at a sale of the property ordered by court in the enforcement of the tax lien. It cannot be that plaintiff in error is concerned with the question of whether or not the owner of the servient estate is before the court and his interest in the property affected by the judgment. Certainly the Louisville & Nashville Railroad cannot claim exemption from assessment in behalf of the lot upon which its right of way exists simply because the owner of the servient estate may not be before the Court.

An examination of the apportionment made by the council, the petition filed by the contractor, and the judgment rendered by the Court, show conclusively that only the *lot* of land specifically described by metes and bounds is sought to be held liable in these proceedings.

The Court of Appeals of Kentucky adjudged that the particular use to which a lot of land may be employed cannot determine its liability or its exemption from liability in the matter of special assessments.

> "The strip of land used by the railroad company the day "before it was appropriated by it as a right of way was a lot "in the meaning of the statute, and to thus appropriate it "cannot change its character." (R. 70.)

The roadbed and tracks of the Louisville & Nashville Railroad removed tomorrow will leave a lot within the meaning of the statute, and beyond dispute subject to taxation. Then is it to be argued that the mere presence of the Louisville & Nashville Railroad upon or in connection with real estate works a transformation of a lot into a metaphysical something, neither land nor personalty? To follow the argument of plaintiff in error must lead to this legal legerdemain.

There is no justification in law or morals for the conclusion that a special use of land by a railroad produces other and different results than real estate peculiarly employed by other commercial enterprises.

A manufacturing establishment may purchase of the owner of real estate a perpetual right to occupy the premises for certain designated purposes. It would not be contended that such a division of the title to the estate would avoid all special assessments. Property in a residence district might be the subject of a transaction resulting in the purchase of a perpetual right to employ the ground for residence purposes. But the lot would still continue to exist and be liable for the cost of local improvements. Leases of long duration, contemplating the entire benefit and use of real estate, are of frequent occurrence, but have never been held to work the removal of the land involved from the domain of the tax gatherer.

Nor is it true that the immediate, instant use of property determines whether it has been benefited by adjacent local improvements. In this connection the court should keep in view the important feature of the assessment laws of Kentucky, that property is only liable for the original construction of streets and alleys. All repairs and reconstruction of every kind and when-

ever occurring, are paid for by the municipality out of the general taxes levied on every species of property, so that a lot of land escaping the cost of the original construction of a street can never again be charged with a special tax on account of a second improvement of the highway.

In considering benefits determined by the legislature to result from local improvements, the Court looks beyond the conditions which surround the land at the time the construction is made and the assessment levied. Original construction of streets and alleys must necessarily occur in those portions of the municipality recently annexed and in a measure sparsely settled. Highway improvements are always in advance of population and business, and in most cases the future brings that enhancement in the value of adjacent property, which renders so pre-eminently just the area and frontage scheme of local taxation. The fact that in 1900 the lot of land then occupied by the roadbed and tracks of the Louisville & Nashville Railroad did not receive a benefit to be measured at that time in an amount equal to or in excess of the cost apportioned against the property, would be a poor standard by which to declare the assessment wanting in equity and justice. Today a freight and passenger depot may be constructed upon some portion of the lot affected by the assessment, and benefits of multiplied proportion result to the territory assessed. Within a decade, the present use of the land may be abandoned, and residences or business houses constructed upon the lot, which would receive from the street improved, benefits beyond any tax that has resulted from the improvement of the thoroughfare.

The real estate can at no future time be asked to contribute for the construction of the street, and all prospective benefits must now or never be taken into contemplation in adjudging the validity or invalidity of the present tax.

X.

Under the aspect of the case as presented by plaintiff in error, the decision of the Kentucky Appellate Court should not be reviewed or reversed.

The contention of counsel for plaintiff in error that the per-

petual right of way of the railroad is not property to be taxed under the Kentucky law of special assessments, does not present a question determinable in this Court. The decision of the Court of Appeals of Kentucky respecting this phase of the litigation did nothing more than place a construction upon the Statue of Kentucky in defining what was meant by the terms "lot," "property" and "square feet owned," as used in the provisions governing local improvements.

Such construction will be adopted by this Court if the legislature might rightfully have done what the interpretation of the State Court says it did.

Commercial Bank vs. Buckingham, 5 How., 326.

Murray vs. Gibson, 15 How., 423.

Guthrie on Fourteenth Amendment, page 44.

The Court of last resort in Kentucky has ruled, according to the position of opposing counsel, that a perpetual easement in property is subject to special taxation under the statutes of the state. As an original proposition this Court might hold otherwise. But the mere definition of the terms "lot," "property" and "square feet owned" so as to include the holdings of the Louisville & Nashville Railroad does not violate any provision of the Fourteenth Amendment. The plaintiff in error in purchasing its right of way and locating its roadbed must be presumed to have known that under the Kentucky assessment laws, its property would be subject to local taxation.

In Turner vs. Commissioners, 173 U. S., 461, this Court reviewed a judgment of the Supreme Court of North Carolina, holding that certain bonds issued by the County of Wilkes were void, by reason of the unconstitutionality of the law under which they were issued. The Court, by Mr. Justice Peckham, said:

> "This being a writ of error to a State Court, we cannot "take jurisdiction under the allegation that a contract has "been impaired by a decision of that Court, when it appears "that the State Court has done nothing more than construe its own Constitution and statutes existing at the time when "the bonds were issued. We are, therefore, bound, by the "decision of the State Court in regard to the meaning of the "constitution and laws of its own state, and its decision upon "such a state of facts raises no Federal question."

In Missouri, etc., R. Co. vs. McCann, 174 U. S., 580, it is held: "The elementary rule is that this Court accepts the interpretation of the statute of a state, affixed to it by the court of last resort thereof."

Sioux City Trust Co. vs. Trust Company, 172 U. S. 642.
Merchants' Bank vs. Pennsylvania, 167 U. S. 461.
Morley vs. Lakeshore Co., 146 U. S. 162.
Board vs. Louisiana, 179 U. S. 622.
Arnt vs. Griggs, 134 U. S. 316.

XI.

Meeting the plaintiff in error on its own ground, it is submitted that the perpetual right of way of the Louisville & Nashville Railroad Company was taxable in this case. The company owned and held the land as its absolute, exclusive property. No attempt was or will be made to find a servient estate to show that the road held only a dominant easement. The vague, indefinite possibility of reversion in some unknown and unknowable person is certainly not property to be alone taxed for the cost of the street. Such being the case, unless the real estate has ceased to exist, the railroad must own property as contemplated by the statute.

"The words employed in the deed express absolute dominion and complete enjoyment. These constitute property and all that is understood in proprietorship." Caldwell vs. Fulton, 21 Pa., 763.

Judge Brewer, in Keener vs. Union Pacific, 31 Fed. Rep., 128, said:

"The term 'right of way' has a twofold significance. It "sometimes is used to mean the mere intangible right to "cross; a right of crossing; a right of way. It is often used "to indicate that strip which the railroad company appro-"priates for its use and upon which it builds its roadbed. "Obviously, the term in the statute in this case has the lat-"ter significance, and taxation is to be upon that strip, as-"sessed at its full cash value, which the railroad company

"has appropriated and is using as its right of way, and upon "which, to its entire width, it has placed its tracks and side "tracks."

In Kentucky it has never been held that the fee is alone taxable. Thus a life tenant must pay the cost of public improvements assessed against his lot. Hackworth vs. Artificial Stone Company, 20 Ky. L. R., 1789. Charitable institutions, vested only with the use of property during a prescribed time and for a definite purpose have always been required to meet the burdens of local taxation.

The previous rulings of the Kentucky Court of Appeals on the question of assessment of railroad rights of way are indicated in the opinions of Railroad Company vs. Obst and Stengel, decided February 18, 1875, and City of Ludlow vs. Southern Railroad, 78 Ky., 357. The following quotations from the above cases are found in the Ludlow opinion:

"Real property held by railroad companies within the cor- "porate limits of the city of Louisville is not exempt from "street taxation. The terms of the grant of the power to tax "for such purposes included all real estate, and that held by "railroad companies, like that held by churches, colleges and "hospitals, and other institutions of like character, must bear "its proportion of local burden. There is no constitutional "restriction upon the power of the legislature to impose local "taxation upon railroad companies. It is a mere question of "policy.

"The rulings of the Court of last resort in other states are "almost uniformly in accord with the decision of this Court "upon this question.

"In the City of Chicago vs. Baer (41 Ill., 306), it was held "that a street railway was subject to assessment for the im- "provement of the street on which it was located.

"In the Northern Indiana R. R. Co. vs. Connelly (10 Ohio "State, 164), it was held that the roadbed was assessable for "the street improvement, notwithstanding the fact that the "company derived no benefit from the improvement of the "street.

"In the B. & M. R. R. Co. vs. Spearman (22 Iowa, 112), "the depot grounds were held to be subject to assessment for "street improvement.

"To the same effect are the cases of City of New Haven "vs. Fair Haven & Westville R. R. Co., 38 Conn., 422; Street "Railway Appeal, 32 Cal.; State vs. Newark, 3 Dutcher (N. "J.); Taylor vs. Palmer, 31 Cal.; Drainage Co. Case, 11 La. "Ann.; Emery vs. Gas Co., 28 Cal.; State vs. New Brunswick, "1 Vroom; and Orance & Alexander Railroad Co. vs. the "City of Alexander, 17 Grattan.

"We think that, both upon reason and authority, a lot held "and owned by the railroad company as this is held and used, "is as much subject to assessment for street improvements "as if it belonged to a natural person. In the law authorizing "the assessment there is no exemption of railroad property, "nor exemption of property because of its application to cer- "tain uses."

The weight of authority in other states seems to be in keeping with the rulings of the Kentucky Appellate Court. A brief mention of decisions elsewhere is here made only to exhibit the trend of the decisions. The citations will also serve the purpose of emphasizing our contention that there is present in the record no constitutional question; the only controversy being the property interpretation of the assessment laws of the state.

In the case of Cicero vs. Chicago R. R. Co., 176 Ill., 501, the Court reviews a great number of cases decided by the Supreme Court of Illinois, and concludes as follows:

"Under the cases cited, we regard the question settled that "a street railway occupying a public street is liable to be as- "sessed for a local improvement in the same manner as other "property owners."

In Indianapolis & V. R. R. Co. vs. Capitol Paving & Const. Co., 54 N. E., 1076, the Indiana Appellate Court defines the term "lot" as employed in a statute providing for special assessment and its application to a railroad right of way.

"It is further argued that the assessment is void because "appellant's right of way is not 'lands or lots' within the "meaning of the charter. A railroad company has an ease-

"ment in grounds occupied by its tracks. An easement
"an incorporeal right created by grant, and always carr
"with it an interest in the land in or over which it is to
"enjoyed. 2 Minor Inst., 20 et seq. In some jurisdictions
"is held that a street assessment cannot be enforced agai
"a railroad's abutting right of way, because it is not land, a
"because public policy forbids the severance of the seve
"parts essential to the use and operation of the road. S
"Chicago, M. & St. P. Ry. Co. vs. City of Milwaukee,
"Wis., 506, 62 N. W., 417. But it has been held in this sta
"that the right of way of a railway company abutting up
"or bordering upon a street may be assessed for the improv
"ment of the street. Railroad Co. vs. Hanna, 68 Ind., 56
and cases there cited; Railroad Co. vs. Hays, 17 Ind. Ap
261, 44 N. E., 375; 45 N. E., 675, and 46 N. E., 597. See al
Paterson & H. R. R. Co. vs. City of Passaic, 54 N. J. La
340; 23 Atl., 945."

In Paterson R. R. Co. vs. City of Passaic, 54 N. J. Law, 34
is found the following:

"The cases of New Jersey R. Co. vs. City of Elizabeth,
"Broom, 330, and Jersey City ads. New Jersey Midland Ra
"road Co., 13 Ib. 97, are authority for the proposition th
"the roadbed of the railroad company is property legally su
"ject to assessment for municipal benefits."

The rule to be gathered from the collected adjudications o
the subject is laid down in Smith on Modern Law of Municip
Corporations, Sec. 1239, in this language:

"Where the statute authorizes assessment for local im
"provements against abutting property, the right of way
"a railroad company is assessable; and it need not be mad
"against the right of way as an entirety, but may be agains
"that part only which fronts on the improvement. A railroa
"right of way parallel to a street may be specially assesse
"for local improvement; but not where it is across the stree
"and so may lands used for a depot, warehouse, roundhous
"and shops."

The case of Illinois Central Railroad Company vs. Decatu
147 U. S., 190, is an expression of opinion by this Court on a
points raised in the present case. To defray the cost of gradin
and paving a street in the City of Decatur, two parcels of lan

forming part of the right of way of the Illinois Central Railroad were assessed in the amount of $262.70. The road claimed an exemption from all taxation under its charter from the General Assembly of Illinois. Mr. Justice Brewer, in stating the opinion of the Court, deals extensively with the theory and principles upon which special assessments are sustained. The conclusion reached was that the right of way of the railroad was not exempt, as the assessment was made on the idea of benefit, and this feature of the tax removed the case from the terms and provisions of the company's charter. It would appear that a proper analysis of the opinion in Illinois Central Railroad vs. Decatur renders it controlling upon the questions here in issue. The same considerations that moved the Court to deny the contentions of the railroad company in the case cited apply with equal force in the present submission.

The following from Cooley on Taxation is quoted with approval by the Court.

> "As in the case of all other taxation, it may sometimes "happen that the expenditure will fail to realize the expec- "tation on which the levy is made; and it may thus appear "that a special assessment has been laid when justice would "have required the levy of a general tax; but the liability "of a principle to erroneous or defective application can not "demonstrate the unsoundness of the principle itself, and "that which supports special assessments is believed to be "firmly based in reason and justice."

A large number of cases bearing upon the same doctrine is referred to in the opinion to show that the reasons underlying special assessments would not permit the Illinois Central Railroad to escape such burdens under the exemption set forth in its charter. The Court therefore concludes in this language:

> "There was nothing in the terms of that contract to pre- "vent the State from committing the final determination of "the question of benefits to the city council rather than "leaving the matter of ascertainment to a jury. And "whether the charges are called special taxes or special assess- "ments, and by whatever tribunal or whatever mode the "question of benefits may be determined, the facts remain

" that the charges are for a local improvement, and cast upon
" the contiguous property, upon the assumption that it has
" received a benefit from such improvement, which benefit
" justifies the charge. The charges here are not taxes proper,
" are not contributions to the State or to the city for the pur-
" pose of enabling either to carry on its general administration
" of affairs, but are a charge only and specially for the cost
" of a local improvement, supposed to have resulted in an
" enhancement of the value of the railroad company's prop-
" erty."

Illinois Central Railroad Co. vs. Decatur goes farther than the decision of the Court of Appeals in the case at bar. The conclusiveness and finality attaching to the action of a legislature in determining benefits is carried to the point of preventing a special assessment on the railroad right of way from coming within the exemption granted against " all taxation of every kind."

Plaintiff in error invokes a decision to the effect that the legislative ascertainment of benefit is not conclusive or final in any way or for any purpose.

XII.

The cases referred to by opposing counsel are not numerous, and simply evidence a difference of opinion as to the proper construction of assessment statutes. In two of the cases cited in support of the position taken by plaintiff in error, it is expressly stated that "Kentucky, New Jersey, Illinois, Ohio, California and Indiana hold that under the statutes of those States the right of way of a railroad is assessable for local improvements." Railroad vs. Milwaukee, 87 Wisc., 517; Railroad vs. City of Ottumwa, 112 Iowa, 304.

This Court would not sanction the argument of plaintiff in error if a corporation in another line of business should present it in an effort to escape a local assessment. A merchant, a manufacturer or a warehouseman, instead of taking a fee simple title to real estate, might have granted a perpetual user to property for purposes necessary to the transaction of business. Then by showing that the improvement of a highway did not add to profits (hauling being done from another door and over another street) and further representing that only a right of way in the

property was held, all burdens of local taxation could be avoided. This is a sure and certain deduction from the argument of counsel for plaintiff in error, and in its manifest unsoundness is presented a complete answer to the contentions made.

It would seem that no property in the community ought in fairness and as a matter of common sense contribute more certainly to the cost of street improvements than a railroad, regardless whether the property taxed be a freight depot, a passenger station or a right of way adjacent to such depot and station.

The proper view of this case presents only the question:—does the lot of land now used by the plaintiff in error enjoy special exemptions from taxation on account of L. & N. occupancy? In other words, does the use of property on the day of assessment settle for all times its liability for local improvements?

The Kentucky Courts have held in the negative and we ask that their judgment be affirmed.

Respectfully,

A. E. RICHARDS,
City Attorney of Louisville.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
For Barber Asphalt Paving Co.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows: The sections quoted are portions of an act of the Kentucky Legislature, entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed, Kentucky Statutes:

PUBLIC WAYS.

Section 2832. Public Ways—Improvements—Meaning of Terms. Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien. When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance. The general council shall have power by ordinance, recommended by the board of public works, to cause the digging and the walling of public wells and cisterns,

and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square from the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the general council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the board of public works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid.

Section 2834. Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance. A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. Sidewalks and Curbing—Apportionment of Costs. The cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot, as owned by the parties respectively fronting

said improvement, except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. Property Owners Permitted to Improve Public Ways. —The board of public works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the board of public works.

Section 2837. Inspection and Reception of Work—Publication of Notice. When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the board of public works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents, and representatives, may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. Action to Enforce Lien—Evidence—Provision for Redemption. In all action to enforce liens, a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be prima facie evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be prima facie evidence of every other fact necessary to be established by the plaintiff in such actions to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent. per annum, and all the taxes and assessments on and against

such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments; and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. Apportionment Warrants—Registration—Lien. The board of public works shall make out all apportionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs, and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphadetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the board of public works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.

Supreme Court of the United States.

No 170.—October Term, 1904.

The Louisville and Nashville Railroad Company, Plaintiff in Error, vs. The Barber Asphalt Paving Company and The City of Louisville.	In Error to the Court of of Appeals of the State of Kentucky.

[April 3, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding under the Kentucky Statutes, § 2834, to enforce a lien upon a lot adjoining a part of Frankfort Avenue, in Louisville, for grading, curbing and paving with asphalt the carriageway of that part of the avenue. The defendant, the plaintiff in error, pleaded that its only interest in the lot was a right of way for its main roadbed, and that neither the right of way nor the lot would or could get any benefit from the improvement, but on the contrary rather would be hurt by the increase of travel close to the defendant's tracks. On this ground it set up that any special assessment would deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. It did not object to the absence of the parties having any reversionary interest, but defended against any special assessment on the lot. The answer was demurred to, judgment was rendered for the plaintiff, and this judgment was affirmed by the Kentucky Court of Appeals. 76 S. W. R. 1097. A writ of error was taken out, and the case was brought to this Court. It will be noticed that the case concerns only grading, curbing and paving, and what we shall have to say is confined to a case of that sort.

The State of Kentucky created this lien by a statute entitled "An act for the government of cities of the first class." Louisville is the only city of the first class at present in Kentucky, and the general principles of the act are taken verbatim from the part of the charter of Louisville which was considered and upheld by this Court in *Walston* v. *Nevin*, 128 U. S. 578. But we take the statute as a general prospective law and not as a legislative adjudication concerning a particular place and a particular plan such as may have existed in *Spencer* v. *Merchant*, 125 U. S. 345, and as was thought to exist in *Smith* v. *Worcester*, 182 Mass. 232, referred to at the argument.

The law provides in the case of original construction, such as this improvement was, that it shall be made at the exclusive cost of the adjoining owners,

to be equally apportioned according to the number of feet owned by them. In the case of a square or subdivision of land bounded by principal streets, which the land including the defendant's lot was held to be, see *Cooper* v. *Nevin*, 90 Ky. 85; *Nevin* v. *Roach*, 86 Ky. 492, 499, the land is assessed half way back from the improvement to the next street. Acts of 1898, c. 48. Ky. Stats. § 2833. A lien is imposed upon the land and "the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." § 2834. The principle of this mode of taxation seems to have been familiar in Kentucky for the better part of a hundred years. *Lexington* v. *McQuillan*, 9 Dana, 513.

The argument for the plaintiff in error oscillates somewhat between the objections to the statute and the more specific grounds for contending that it cannot be applied constitutionally to the present case. So far as the former are concerned they are disposed of by the decisions of this Court. There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer* v. *Merchant*, 125 U. S. 345, it is important for this Court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. *Walston* v. *Nevin*, 128 U. S. 578. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324. *Webster* v. *Fargo*, 181 U. S. 394. *Cass Farm Co.* v. *Detroit*, 181 U. S. 396. *Detroit* v. *Parker*, 181 U. S. 399. *Chadwick* v. *Kelley*, 187 U. S. 540, 543, 544. *Schaefer* v. *Werling*, 188 U. S. 516. *Seattle* v. *Kelleher*, 195 U. S. 351, 358.

A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area,

and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson* v. *New Orleans*, 96 U. S. 97, 106. *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692. *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 55. *Detroit* v. *Parker*, 181 U. S. 399, 400. *Chadwick* v. *Kelley*, 187 U. S. 540, 544.

But in this case it is not necessary to stop with these general considerations. The plea plainly means that the improvement will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. Compare *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226, 257, 258. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. See *Illinois Central R. R.* v. *Decatur*, 147 U. S. 190. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues—for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied. We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the Fourteenth Amendment of the Constitution of the United States.

Judgment affirmed.

Mr. Justice HARLAN, not having been present at the argument, took no part in the decision.

Mr. Justices WHITE and PECKHAM dissent.